Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MILLARD MCKINNEY,
Petitioner,
v.
OSCEOLA COUNTY BOARD OF COUNTY COMMISSIONERS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a public employee who has a state-created property interest in continued employment state a claim under the substantive component of the Due Process Clause of the Fourteenth Amendment if the employee is terminated for reasons that are arbitrary and capricious, regardless of whether or not the procedures that are made available to the employee are constitutionally adequate?

2. (a) If a public employee with a state-created property interest in continued employment is terminated by the governing body of the political entity that employed him, in a situation in which it was feasible to hold a pretermination hearing, and the hearing that in fact was held failed to satisfy constitutionally mandated procedural requirements, does the employee state a claim under the procedural component of the Due Process Clause of the Fourteenth Amendment, notwithstanding the availability of a constitutionally adequate postdeprivation remedy in state court?

(b) Is a postdeprivation action in state court a constitutionally "adequate" remedy for a public employee who was deprived of a state-created property interest in continued employment following a constitutionally inadequate hearing, if the state court is limited to a review of the record developed in the constitutionally inadequate predeprivation hearing?

PARTIES

In addition to respondent Osceola County Board of County Commissioners, the case caption in the United States Court of Appeals for the Eleventh Circuit listed John Pate and Jack Shannin as defendants-appellees. Pate was listed individually and in his official capacity as Commissioner of the Osceola County Board of County Commisisoners, and Shannin was listed individually and in his official capacity as Development Department Director of Osceola County. As part of a joint stipulation by the parties in the United States District Court for the Middle District of Florida, both Pate and Shannin were voluntarily dismissed. Petitioner Millard McKinney was the sole plaintiff-appellant in the courts below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
A. Statement of Facts	2
B. Disposition in the Courts Below	6
REASONS FOR GRANTING THE WRIT	11
I. SUBSTANTIVE DUE PROCESS	12
II. PROCEDURAL DUE PROCESS	18
A. The Applicability of *Parratt v. Taylor*	18
B. The Adequacy of McKinney's State-Court Remedy	22
CONCLUSION	24
APPENDICES:	
APPENDIX A	
Opinion of the United States Court of Appeals for the Eleventh Circuit (en banc) (May 5, 1994)	1a
APPENDIX B	
Order of the United States Court of Appeals for the Eleventh Circuit (June 17, 1993)	33a

TABLE OF CONTENTS—Continued

APPENDIX C Page

Opinion of the United States Court of Appeals for the Eleventh Circuit (March 17, 1993) 35a

APPENDIX D

Opinion of the United States District Court for the Middle District of Florida (April 8, 1991) 63a

APPENDIX E

Opinion (Order) of the United States District Court for the Middle District of Florida (February 4, 1991) 68a

TABLE OF AUTHORITIES

CASES

	Page
Archuleta v. Colorado Dep't of Institutions, 936 F.2d 483 (10th Cir. 1991)	17
Arlotta v. Florida Parole & Probation Comm'n, 419 So. 2d 1159 (Fla. Dist. Ct. App. 1982)	23
Board of Regents v. Roth, 408 U.S. 564 (1972)	12, 14
Cherokee Crushed Stone, Inc. v. City of Miramar, 421 So. 2d 684 (Fla. Dist. Ct. App. 1982)	23
Chronopoulos v. University of Minnesota, 1994 Minn. App. LEXIS 781 (Minn. Ct. App. Aug. 16, 1994)	17
City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982)	22, 23
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)	20
Committee of U.S. Citizens v. Reagan, 859 F.2d 929 (D.C. Cir. 1988)	17
Easter House v. Felder, 910 F.2d 1387 (7th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991)	21, 22
Education Dev. Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals, 541 So. 2d 106 (Fla. 1989)	22
Gargiul v. Tompkins, 704 F.2d 661 (2d Cir. 1983), *vacated on other grounds*, 465 U.S. 1016 (1984)	15
Gentry v. City of Lee's Summit, 10 F.3d 1340 (5th Cir. 1993)	22
Givan v. City of Colorado Springs, 876 P.2d 27 (Colo. Ct. App. 1993), *cert. granted* (Colo. June 20, 1994)	17
Gutzwiller v. Fenik, 860 F.2d 1317 (6th Cir. 1988)	16
Hamilton v. Board of Trustees of Oconee County School Dist., 319 S.E.2d 717 (S.C. Ct. App. 1984)	17
Harrah Indep. School Dist. v. Martin, 440 U.S. 194 (1979)	13, 16
Haskins v. City of Chattanooga, 877 S.W.2d 267 (Tenn. Ct. App. 1993)	17
Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1982)	7

TABLE OF AUTHORITIES—Continued

	Page
Holley v. Seminole County School Dist., 755 F.2d 1492 (11th Cir. 1985)	9
Huang v. Board of Governors of Univ. of North Carolina, 902 F.2d 1134 (4th Cir. 1990)	17
Hudson v. Palmer, 468 U.S. 517 (1984)	19
Johnson v. Louisiana Dep't of Agriculture, 18 F.3d 318 (5th Cir. 1994)	21
Johnston-Taylor v. Gannon, 907 F.2d 1577 (6th Cir. 1990), *cert. denied*, 113 S. Ct. 1583 (1993)	16
Kauth v. Hartford Ins. Co., 852 F.2d 951 (7th Cir. 1988)	16
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	21
Lowe v. Scott, 959 F.2d 323 (1st Cir. 1992)	22
Lum v. Jensen, 876 F.2d 1385 (9th Cir. 1989), *cert. denied*, 493 U.S. 1057 (1990)	17
Mackey v. Dyke, 29 F.3d 1086 (6th Cir. 1994)	22
Matthias v. Bingley, 906 F.2d 1047, *modified*, 915 F.2d 946 (5th Cir. 1990)	22
Morris v. Clifford, 903 F.2d 574 (8th Cir. 1990)	15
Newman v. Massachusetts, 884 F.2d 19 (1st Cir. 1989), *cert. denied*, 493 U.S. 1078 (1990)	15
Nolin v. Douglas County, 903 F.2d 1546 (11th Cir. 1990)	8
Pace v. Hymas, 726 P.2d 693 (Idaho 1986)	17
Palko v. Connecticut, 302 U.S. 319 (1937)	14
Parratt v. Taylor, 451 U.S. 527 (1981)	*passim*
Plumer v. Maryland, 915 F.2d 927 (4th Cir. 1990)	20, 22
Ponte v. Real, 471 U.S. 491 (1985)	12
Ragland v. State, 46 So. 724 (Fla. 1908)	23
Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985)	8, 13, 16
San Filippo v. Bongiovanni, 961 F.2d 1125 (3d Cir.), *cert. denied*, 113 S. Ct. 305 (1992)	17
Schaper v. City of Huntsville, 813 F.2d 709 (5th Cir. 1987)	15, 16
Scott v. Board of Comm'rs, 785 P.2d 221 (N.M. 1989)	17

TABLE OF AUTHORITIES—Continued

Page

Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) 12
Sutton v. Cleveland Board of Education, 958 F.2d 1339 (6th Cir. 1992) 16
Swank v. Smart, 898 F.2d 1247 (7th Cir.), *cert. denied*, 498 U.S. 853 (1990) 20
Weimer v. Amen, 870 F.2d 1400 (8th Cir. 1989) 16
Zinermon v. Burch, 494 U.S. 113 (1990) 10, 16, 19-22

CONSTITUTION, STATUTES, AND RULES

U.S. Const. amend. XIV ..... *passim*
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 6
Fla. Stat. § 120.68(4) 23
Fla. R. App. P. 9.030(c)(3) 22

MISCELLANEOUS

Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309 (1993) 14

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PETITION FOR WRIT OF CERTIORARI

Petitioner Millard McKinney respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit *en banc* in *McKinney v. Pate*, 20 F.3d 1550 (May 5, 1994).

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 20 F.3d 1550, and is reproduced in Appendix A (1a-32a). The order of the Eleventh Circuit vacating the panel opinion and ordering rehearing *en banc* is reported at 994 F.2d 772, and is reproduced in Appendix B (33a-34a). The vacated opinion of the Eleventh Circuit panel that initially heard the appeal is reported at 985 F.2d 1502, and is reproduced in Appendix C (35a-62a). The opinion of the United States District Court for the Middle District

of Florida, dated April 8, 1991, setting aside the jury verdict in favor of petitioner, is unreported and is reproduced in Appendix D (63a-67a). The order of the district court, dated February 4, 1991, granting in part and denying in part defendants' motion for summary judgment, is unreported and is reproduced in Appendix E (68a-73a).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit *en banc* was entered on May 5, 1994. A timely petition for rehearing was denied on June 30, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution, section 1, provides in relevant part as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. Statement of Facts [1]

On July 27, 1987, petitioner Millard McKinney was hired by respondent Osceola County (Florida) Board of County Commissioners ("Board") as the Osceola County Building Official. R2-31.[2] In this position, McKinney headed the Building Division, which was one of three divisions of the County's Development Department. McKinney's immediate supervisor was Jack Shannin, Director of the Development Department. Shannin reported

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[1] Because the appeal in this case was from the district court's entry of judgment notwithstanding the jury's verdict for McKinney, the evidence presented to the jury is set forth in the light most favorable to McKinney.

[2] Citations are to the district court record, as certified to the Eleventh Circuit.

to the County Administrator, Eleanor Anderson, who was directly responsible to the Board. R2-39-40.

Upon assuming his position as Building Official, McKinney began to address certain long-standing problems in the Building Division. R2-40-51, 61-69. Among these problems was lax enforcement of the building codes, which had resulted in numerous code violations. R2-113-15. Under McKinney's direction, the building codes were more rigorously enforced. R2-115; R3-300-01.

After successfully completing his probationary period, McKinney became a permanent employee of Osceola County. As stated in the May 9, 1988, performance evaluation that McKinney received from Shannin:

> Your performance to date has been excellent. When that is combined with the understanding of the job it guarantees your inclusion in the full time permanent status.

Pl. Exh. 4. As a permanent employee, McKinney could, under the Osceola County Policy Manual, "be dismissed only for cause as outlined in the Code of Conduct and Disciplinary Procedures and this policy . . . ." Pl. Exh. 2, p. 28.

On July 27, 1988, McKinney received another highly favorable performance evaluation from Shannin. He was rated as "exceptional" in most of the fifteen performance categories, and not lower than "satisfactory" in any of them. Pl. Exh. 4. At this time, McKinney also was given a merit increase in salary. *Id.*

In November 1988, three new members were elected to the five-member Board. One of these new members was John Pate, a former employee of the Building Division who unsuccessfully had sought to become the Osceola County Building Official, the position held by McKinney. R3-291-92. At the time that he was elected to the Board, and while serving as a Board member, Pate was employed in the construction industry.

Prior to his election, Pate on several occasions had come into conflict with McKinney regarding enforcement of the building codes in connection with construction projects in which Pate was involved. R2-115-23. Pate had, for example, protested to McKinney about what he considered to be the Building Division's overly strict application of the code requirement that "fire blocks" be installed in drywall construction. R2-116-20. While serving as a member of the Board, Pate continued to pressure McKinney "on a daily basis," on behalf of various developers and homeowners, to overlook violations of the building codes. R2-124-29. Pate's efforts in this regard were enhanced by the fact that he was the Commissioner who served as liaison between the Board and the Development Department, which included the Building Division that was headed by McKinney. R2-123-24; R3-252-53. McKinney consistently refused to comply with Pate's requests that building code violations be overlooked. R2-115-29.

Several weeks after the November 1988 election, the newly constituted Board met with County Administrator Anderson and discussed complaints that the Commissioners had received from developers about McKinney. R3-277. Based upon the discussion that took place at that meeting, and the "instructions" that she received from Pate at the conclusion of the meeting, Anderson understood the Board's position to be that "McKinney had to go." R3-272-73, 279. Anderson explained the situation to Shannin, and told him "to take care of the problem because if he did not [she] would." R3-277, 295.

Shannin thereupon asked McKinney to resign, informing McKinney that he would otherwise be discharged. R2-130-31. When McKinney asked what the basis for the discharge would be, Shannin responded: "I don't have anything. But I'll get something." R2-132. The bottom line, as Shannin put it, was that "the commissioners wanted [McKinney] out of the job." *Id.* McKinney refused to resign, and he reiterated that refusal in

response to a renewed request by Shannin in mid-December. R2-132-37.

In early January, 1989, McKinney was abruptly suspended and presented with a document entitled "Notice of Reasons for Proposed Termination of Millard McKinney." Pl. Exh. 5; R2-138-39. The thrust of the charges in this document was that McKinney had failed to provide adequate direction to the Building Division and that the Division was as a result operating in an incompetent and inefficient manner. The notice had been prepared by Shannin—who in May and July 1988 had given McKinney excellent performance evaluations, Pl. Exh. 4, and who personally was opposed to terminating his employment, R3-299-300—in response to Anderson's instruction "to get a list of charges against McKinney," because she "wanted to make sure that McKinney was terminated in the proper way." R3-299.

Shortly thereafter, the Board conducted an evidentiary hearing, pursuant to the Osceola County Policy Manual, to consider the charges against McKinney and to decide whether to terminate his employment. Def. Exh. 1.[3] Although McKinney assumed that Pate probably would be biased against him, he had no reason to believe at the time of the hearing that the other commissioners would not be impartial. R2-193-94; R3-242-45. McKinney participated fully in the hearing and attempted to refute the charges against him. R2-193; *see* R2-139-91. At the conclusion of the hearing, the Board adopted an order

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[3] Because McKinney was treated as a "department head," the applicable procedure under the Policy Manual was to conduct the evidentiary hearing prior to, rather than after, his termination. Pl. Exh. 2, pp. 28-30. The County's "normal" termination procedure, applicable to other permanent employees, was to provide the employee with notice and an opportunity to respond in an informal conference with the employee's department head; following termination, the employee would be entitled to a full evidentiary hearing before the county's Personnel Board. *Id.*

sustaining all of the charges against McKinney and terminating his employment. Def. Exh. 2.

B. Disposition in the Courts Below

1. On October 11, 1989, McKinney filed the instant action in the United States District Court for the Middle District of Florida, basing jurisdiction on 28 U.S.C. § 1331. McKinney styled the first count in his complaint as "Substantive Due Process," alleging that his rights under the substantive component of the Due Process Clause were violated because the Board's stated reasons for terminating his employment were pretextual, arbitrary, and without any rational basis in fact. R1-1-3-10.[4] Specifically, it was McKinney's position that he had not been terminated because of incompetent and inefficient performance as stated in the charges against him and in the Board's termination order, but rather because of his insistence on enforcing the building codes despite attempts by politically connected contractors to obtain special treatment. McKinney alleged that he was, therefore, terminated for reasons that were arbitrary and capricious. R1-26-1-4. Prior to trial, the parties stipulated that McKinney had a state-created property interest in his continued employment as Building Official, R1-26-9, and that the actions of Pate and Shannin with respect to McKinney's termination constituted the official expression of Osceola County custom and policy, R1-31.

At the conclusion of a three-day jury trial, the jury was asked to render a verdict by responding to the following two special interrogatories:

> 1. Was there substantial evidence that the plaintiff was fired because of incompetent or inefficient performance of the duties of his office?

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[4] Count II of the complaint alleged a pendent state-law claim, upon which the district court granted summary judgment for defendants. R1-24, App. 70a-73a. That count is no longer at issue.

2. Was the plaintiff fired because of political or personal animosity because of plaintiff's enforcement of the building codes?

R1-41. Accepting McKinney's theory of the case, the jury answered the first interrogatory in the negative and the second in the affirmative. *Id.* The jury awarded McKinney damages in the amount of $145,000. *Id.*

On April 8, 1991, in response to the Board's motion for judgment notwithstanding the verdict, the district court overturned the jury's verdict and entered judgment in favor of the Board. R1-47, 48, App. 63a-67a. In its brief opinion, the court held that "[i]n view of the conflicting evidence and the lack of proof of impartiality [sic] of the judges/commissioners, the jury was compelled to find that the action taken by the Board of Commissioners was not arbitrary, capricious and pretextual." App. 67a.

2. On appeal, a panel of the Eleventh Circuit reversed and ordered that the jury verdict in favor of McKinney be reinstated. It was "well settled," the court noted, that claims like McKinney's "state 'a substantive due process violation—deprivation of a property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational basis.' " App. 41a (quoting *Hearn v. City of Gainesville,* 688 F.2d 1328, 1332 (11th Cir. 1982)). The court found that there was "substantial evidence to support [McKinney's] claim," App. 39a, opining that "[w]hile there were certainly disputed points, the evidence was clearly such that reasonable people could reach different conclusions as to what had occurred." App. 44a. That being the case, the court held that "the issue is appropriately resolved by a jury and the judge is not free to substitute his or her opinion for that of the jury." *Id.*

The panel's decision to reverse was unanimous. In a separate concurring opinion, however, Chief Judge Tjoflat

(joined by Judge Cox) indicated that, while the result was compelled by Eleventh Circuit precedent, he believed that precedent to be erroneous and thought it should be reviewed by the court *en banc*. App. 45a-62a. Subsequently, the Eleventh Circuit ordered rehearing *en banc* and vacated the panel opinion. App. 33a-34a.

3. Upon rehearing *en banc*, the Eleventh Circuit overruled circuit precedent and affirmed the district court's judgment in favor of the Board. App. 1a-32a. The court's *en banc* opinion was authored by Chief Judge Tjoflat, and it adopted essentially the same reasoning that Judge Tjoflat had espoused in his earlier concurring opinion as a member of the panel.

The court drew a sharp line between "procedural" and "substantive" due process, declaring that the latter only "protects those rights that are 'fundamental.'" App. 7a. Quoting Justice Powell's concurring opinion in *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229 (1985), for the proposition that "'substantive due process rights are created only by the Constitution,'" App. 8a-9a, the court concluded that "areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause . . . ." App. 8a. Accordingly, the court rejected existing Eleventh Circuit precedent, under which:

> [a] violation of a public employee's right to substantive due process occurs when an employer deprives the employee of a property interest for an improper motive and by means that [are] pretextual, arbitrary and capricious, regardless of whether or not a hearing was held.

App. 13a (quoting *Nolin v. Douglas County*, 903 F.2d 1546, 1553-54 (11th Cir. 1990)). Rather, said the

court, "only *procedural* issues are implicated" by such claims. App. 14a (emphasis in original).[5]

On the basis of the foregoing reasoning, the court concluded that "McKinney's state-created property right is [not] deserving of substantive due process protection," App. 18a, but must be analyzed "in terms of procedural due process considerations." App. 19a.[6] For purposes of this analysis, the court summarized McKinney's claim as follows:

> McKinney does not deny that the County followed a *facially* adequate procedure; in fact, but for his allegations of bias, McKinney acknowledges that there were no failures of process. McKinney's only contentions are that the facially adequate procedure was biased against him and that the Board was preordained to find against him, regardless of the evidence. On its face, then, McKinney's allegation is procedural: the County failed to provide one of the elements of procedural due process—an unbiased decisionmaker.

App. 18a (emphasis in original).

The classification of a claim as involving "procedural" rather than "substantive" due process is important, the

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[5] According to the court, the procedural due process inquiry should include a "limited substantive review" into "whether the action taken is supported by substantial evidence." App. 12a n.13 (quoting *Holley v. Seminole County School Dist.*, 755 F.2d 1492, 1496 (11th Cir. 1985)). This inquiry, said the court, "assures that there is 'substantial evidence' for the decision and, thus, 'a rational basis for the deprivation of an individual's property.'" *Id.* (quoting *Holley*, 755 F.2d at 1499). The court thought this "an appropriate, essentially procedural, review of the sufficiency of the evidence," *id.*; it took issue only with the label of "substantive due process" that had been affixed to it. *Id.*

[6] The court noted that while McKinney had styled Count I of his complaint "Substantive Due Process," it would "examine McKinney's cause of action for what it actually is, not for what McKinney would have it be"; it therefore gave "no weight" to McKinney's denomination of his claim in the complaint. App. 17a.

court explained, because "unlike substantive due process violations, procedural due process violations do not become complete 'unless and until the state refuses to provide due process.'" App. 21a (quoting *Zinermon v. Burch*, 494 U.S. 113, 126 (1990)). The court then cited *Parratt v. Taylor*, 451 U.S. 527 (1981), and its progeny, construing those cases as holding that "due process [does] not require pre-deprivation hearings where the holding of such a hearing would be impracticable, that is, where the deprivation is the result of either a negligent or an intentional deprivation of property." App. 22a.

It was in light of these principles of procedural due process that the Eleventh Circuit turned to McKinney's claim. Here, said the court, "any bias on the part of the Board was not sanctioned by the State and was the product of the intentional acts of the commissioners . . . ." *Id.* Relying on what it termed the "unambiguous" "precedent established by *Parratt*," *id.*, the court held that

> even if McKinney suffered a procedural *deprivation* at the hands of a biased Board at his termination hearing, he has not suffered a *violation* of his procedural due process rights unless and until the State of Florida refuses to make available a means to remedy the deprivation.

Id. (emphasis in original).

Noting that McKinney had "failed to take advantage of any state remedies" for the deprivation of his property interest, *id.*, the court examined the "adequacy" of the remedy that was available to him under Florida law. Rejecting McKinney's contention that a state-court action was an inadequate remedy because the reviewing court was limited to the record developed before the Board, the Eleventh Circuit found that remedy "adequate." App. 23a-24a. Thus, the court concluded that, "[e]ven if McKinney's bias allegations are true, the presence of a satisfactory state remedy mandates that we find that no

procedural due process violation occurred." App. 24a-25a.

REASONS FOR GRANTING THE WRIT

This Petition for a Writ of Certiorari challenges three positions that have been taken by the Eleventh Circuit with regard to the application of the Due Process Clause of the Fourteenth Amendment to the termination of a public employee who has a state-created property interest in continued employment. We demonstrate below why each of the challenged positions raises an important question of federal law that warrants review by this Court. Before doing so, however, it is helpful to establish a context by discussing briefly the relationship among the Questions Presented, and more specifically by indicating which of the questions it will be necessary for this Court to decide, and in what sequence, in order to dispose of the instant case.

The opinion of the Eleventh Circuit is bottomed on its threshold conclusion that the deprivation of a public employee's state-created property interest in continued employment *never* can provide the basis for a claim under the substantive component of the Due Process Clause. If this Court disagrees, and finds that an employee who alleges that he was terminated for reasons that are arbitrary and capricious does state a substantive due process claim (Question Presented No. 1), the jury verdict in McKinney's favor must be reinstated, and it will be unnecessary to reach Questions Presented 2(a) and 2(b), which relate to the procedural component of the Due Process Clause. (The position of the Eleventh Circuit with regard to substantive due process is addressed in Part I.)

If, on the other hand, this Court agrees with the Eleventh Circuit that McKinney's claim raises only procedural issues, it then must decide whether the doctrine of *Parratt v. Taylor*, 451 U.S. 527 (1981), and its progeny applies

to the facts of the instant case. If this Court rejects the Eleventh Circuit's reading of *Parratt*, and concludes that McKinney can pursue his procedural due process claim regardless of whether the post-termination remedy available to him in state court was constitutionally adequate, the inquiry need go no further. McKinney's allegation that the Board was biased would state a claim under the procedural component of the Due Process Clause. (The position of the Eleventh Circuit with regard to *Parratt v. Taylor* is addressed in Part II(A).)

Question Presented 2(b) is whether the post-termination remedy that was avaliable to McKinney in state court was constitutionally adequate, and more specifically whether the Eleventh Circuit was correct when it answered this question in the affirmative despite the fact that the Florida court to which McKinney could have turned would have been limited to a review of the record developed in the constitutionally inadequate hearing before the Board. It will be necessary for this Court to reach this question only if it concludes that McKinney's claim implicates procedural—and not substantive—due process issues, and that his procedural due process claim is subject to the rule of *Parratt v. Taylor*. (The position of the Eleventh Circuit with regard to the adequacy of the state-court remedy available to McKinney is addressed in Part II(B).)

I. SUBSTANTIVE DUE PROCESS

This Court long has recognized that "[t]he touchstone of due process is freedom from arbitrary governmental action." *Ponte v. Real*, 471 U.S. 491, 495 (1985); *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 559 (1956). Applying this principle to "property" interests, this Court has stated that "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents v. Roth*, 408

U.S. 564, 577 (1972). Accordingly, the Court has recognized in a number of cases that the deprivation of a state-created property interest for arbitrary and capricious reasons violates the substantive component of the Due Process Clause of the Fourteenth Amendment.

For example, in considering the substantive due process claim of a terminated public school teacher who had a state-created property interest in her continued employment, this Court explained that the plaintiff's burden was to show "that there is no rational connection between the Board's action and its conceded interest in providing its students with competent, well-trained teachers." *Harrah Indep. School Dist. v. Martin*, 440 U.S. 194, 198 (1979) (per curiam). Similarly, in *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985), this Court framed the substantive due process inquiry as "whether the record compels the conclusion that the University acted arbitrarily in dropping Ewing" from the university program in which he had been enrolled.[7]

While these cases reflect the Court's position that the Due Process Clause affords "substantive" protection against the deprivation of state-created property interests for arbitrary and capricious reasons, individual Justices have on occasion expressed a contrary view. Thus, in his concurring opinion in *Ewing*, Justice Powell asserted that,

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[7] The Eleventh Circuit's *en banc* opinion in this case attempts to distinguish *Harrah* on the ground that what was at issue there was a "legislative" rather than an "executive" act, App. 9a-10a n.9, but that characterization of *Harrah* does not survive scrutiny. The Court in *Harrah* described as follows the school board's action at issue in the case: "Finding [Martin's] persistent noncompliance with the continuing-education requirement 'wilful neglect of duty,' the Board voted at its April 1974 meeting not to renew her contract for the following school year." 440 U.S. at 196. It is difficult to see how that action differs in any meaningful respect from the Board's decision to terminate McKinney in the instant case. And the executive/legislative distinction cannot in any event explain this Court's analysis in *Ewing*.

> [w]hile property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), *substantive due process rights are created only by the Constitution.*

474 U.S. at 229 (emphasis added). Although Justice Powell spoke only for himself, and cited no supporting authority, this dictum—and the acknowledged fact that substantive due process does indeed protect "fundamental" constitutional rights[8]—have caused a divergence of opinion among the federal courts of appeals with regard to the point at issue in the instant case.

Seven of the federal circuits squarely have decided the question of whether public employees are protected by the substantive component of the Due Process Clause against the deprivation of a state-created property interest in continued employment for reasons that are arbitrary and capricious. Of these, four circuits have held that substantive due process *does* confer such protection, two have held that it *does not*, and one circuit has spoken equally squarely in both directions. Virtually all of the remaining circuits have had something to say about the matter,

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[8] There is no question that one important function of substantive due process is to protect "fundamental" rights. *E.g.*, *Palko v. Connecticut*, 302 U.S. 319 (1937). But the proposition that substantive due process protects *only* fundamental rights—as the Eleventh Circuit suggests, *see* App. 7a-9a, 18a—does not follow and has no support in this Court's cases. As one commentator has observed:

> [S]ubstantive due process review is both more differentiated and pervasive than is ordinarily recognized. The "fundamental rights" jurisprudence of cases such as *Roe v. Wade* represents only the tip of the iceberg. In its commonest form, substantive due process doctrine reflects the simple but far-reaching principle . . . that government cannot be arbitrary.

Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 310 (1993).

albeit without finding it necessary actually to decide the question.

The First, Second, Fifth, and Eighth Circuits have recognized the substantive due process right at issue. In the context of resolving a question of qualified immunity, the First Circuit has held that, as of 1982, a public employee had a "clearly established substantive due process right to be free from arbitrary and capricious decisions affecting her employment status." *Newman v. Massachusetts*, 884 F.2d 19, 24 (1st Cir. 1989), *cert. denied*, 493 U.S. 1078 (1990). The court added that its recognition of that right as of 1982 was (in 1989) "still viable law today." *Id.* at 25. The Second Circuit has reached the same conclusion, holding that, as a matter of substantive due process, a public employer's "actions impairing [a property interest in continued employment must] have a rational relation to a proper governmental purpose." *Gargiul v. Tompkins*, 704 F.2d 661, 668 (2d Cir. 1983), *vacated on other grounds*, 465 U.S. 1016 (1984). The Fifth Circuit likewise has held, in *Schaper v. City of Huntsville*, 813 F.2d 709, 716-17 (5th Cir. 1987), that a public employee with a state-created property interest in continued employment is protected against deprivation of that interest by the requirements of substantive, as well as procedural, due process. Similarly, the Eighth Circuit (in deciding a qualified immunity question) concluded that a tenured faculty member at a public university "has a substantive due process right to be free from discharge for reasons that are 'arbitrary and capricious,' or in other words, for reasons that are trivial, unrelated to the education process, or wholly unsupported by a basis in fact." *Morris v. Clifford*, 903 F.2d 574, 576-77 (8th Cir. 1990).[9]

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[9] The Fifth and the Eighth Circuits have held that the rule of *Parratt v. Taylor*, 451 U.S. 527 (1981), should be applied to substantive as well as procedural due process claims, at least in this context, so as not to permit litigants to "eviscerate" *Parratt* by the expedient of characterizing their claims as resting on substantive

In addition to the Eleventh Circuit in the *en banc* decision in this case, *see* App. 7a-9a, the Seventh Circuit has taken the position that no such substantive due process right exists. Acknowledging the analysis applied by this Court in *Harrah* and *Ewing*, *supra*, the Seventh Circuit, in *Kauth v. Hartford Ins. Co.*, 852 F.2d 951, 956-58 (7th Cir. 1988), nonetheless believed that recognizing a substantive due process claim in these circumstances would undermine the integrity of *Parratt v. Taylor*, 451 U.S. 527 (1981). The court's solution was to reject the existence of a substantive due process right altogether.[10]

The Sixth Circuit's jurisprudence contains cases deciding the question in both directions. In *Sutton v. Cleveland Board of Education*, 958 F.2d 1339, 1350-51 (6th Cir. 1992), the Sixth Circuit, much like the Eleventh Circuit in the instant case, relied on Justice Powell's dictum in *Ewing* for its conclusion that only "fundamental" interests are protected by substantive due process, and that a statutory right to be terminated only for cause was not such a fundamental interest. On the other hand, earlier Sixth Circuit cases—which *Sutton* did not purport to overrule—have recognized substantive due process protection for public employees against arbitrary and capricious decisions depriving them of an interest in continued employment. *See Gutzwiller v. Fenik*, 860 F.2d 1317, 1328-29 (6th Cir. 1988); *Johnston-Taylor v. Gannon*, 907 F.2d 1577, 1582 (6th Cir. 1990), *cert. denied*, 113 S. Ct. 1583 (1993).

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rather than procedural due process. *Schaper*, 813 F.2d at 717-18; *Weimer v. Amen*, 870 F.2d 1400, 1406 (8th Cir. 1989). After *Zinermon v. Burch*, 494 U.S. 113 (1990), however, this no longer appears to be a valid position, inasmuch as *Zinermon* made clear that a substantive due process claim "is complete when the wrongful action is taken," and that a plaintiff with such a claim therefore "may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights." *Id.* at 125.

[10] The court's concern with *Parratt* was similar to that of the Fifth and Eighth Circuits. *See supra* note 9.

Nearly all of the remaining circuits, while finding it unnecessary to decide the question, nonetheless have discussed it. And this discussion likewise reflects a diversity of opinion. *See San Filippo v. Bongiovanni*, 961 F.2d 1125, 1138-39 (3d Cir.) (citing cases from other circuits applying substantive due process to arbitrary dismissals of public employees), *cert. denied*, 113 S. Ct. 305 (1992); *Huang v. Board of Governors of Univ. of North Carolina*, 902 F.2d 1134, 1142 n.10 (4th Cir. 1990) (suggesting in dicta that a state-created property interest cannot form the basis for a substantive due process claim); *Lum v. Jensen*, 876 F.2d 1385, 1387-89 (9th Cir. 1989) (holding, for purposes of qualified immunity analysis, that substantive due process protection against arbitrary discharge from public employment was not "clearly established" in the Ninth Circuit as of 1984), *cert. denied*, 493 U.S. 1057 (1990); *Archuleta v. Colorado Dep't of Institutions*, 936 F.2d 483, 489 n.6 (10th Cir. 1991) (assuming, without holding, that a property interest in continued employment is protected by substantive due process); *see also Committee of U.S. Citizens v. Reagan*, 859 F.2d 929, 943-44 (D.C. Cir. 1988) (substantive due process prevents governmental action that is "legally irrational [in that] it is not sufficiently keyed to any legitimate state interests").[11]

We need not belabor the point. The Eleventh Circuit not only is wrong, but its *en banc* opinion adds to the

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[11] The conflict among the federal circuits is mirrored in decisions of the state appellate courts. Again, the majority of the state courts that have decided the question have recognized the existence of the substantive due process right at issue here. *See, e.g., Givan v. City of Colorado Springs*, 876 P.2d 27 (Colo. Ct. App. 1993), *cert. granted* (Colo. June 20, 1994); *Pace v. Hymas*, 726 P.2d 693, 698 (Idaho 1986); *Chronopoulos v. University of Minnesota*, 1994 Minn. App. LEXIS 781, *24-25 (Minn. Ct. App. Aug. 16, 1994); *Hamilton v. Board of Trustees of Oconee County School Dist.*, 319 S.E.2d 717, 721 (S.C. Ct. App. 1984). *Contra Scott v. Board of Comm'rs*, 785 P.2d 221, 223-24 (N.M. 1989); *Haskins v. City of Chattanooga*, 877 S.W.2d 267 (Tenn. Ct. App. 1993).

confusion among the courts of appeals as to whether a public employee with a state-created property interest in continued employment states a claim under the substantive component of the Due Process Clause if he is discharged for arbitrary and capricious reasons. The grant of a writ of certiorari would allow this Court to settle this important question of federal law.

II. PROCEDURAL DUE PROCESS

A. The Applicability of *Parratt v. Taylor*

Assuming, *arguendo*, that McKinney's complaint does not raise substantive due process issues, the next question is whether McKinney states a claim under the procedural component of the Due Process Clause. It scarcely warrants extended discussion to demonstrate that McKinney's hearing before the Board did not satisfy constitutionally mandated due process minima. As the Eleventh Circuit acknowledges, "[i]t is axiomatic that, in general, the Constitution requires that the state provide . . . an impartial decisionmaker before infringing on a person's interest in . . . property," App. 19a, and in the procedural posture of this case McKinney's allegation that he was deprived of his state-created property interest in continued employment by a biased Board must be accepted as true.

But this is not the end of the matter. Whether the Board's bias means that McKinney suffered a violation of his procedural due process rights depends on whether this case comes within the ambit of *Parratt v. Taylor*, 451 U.S. 527 (1981), in which this Court held that the availability of a constitutionally adequate postdeprivation remedy in state court satisfies the demands of procedural due process where the deprivation complained of was caused by "random and unauthorized" conduct. The Eleventh Circuit concluded that the circumstances envisioned by *Parratt* were present here; we submit that the court misapplied the teaching of that case and its progeny.

In *Zinermon v. Burch*, 494 U.S. 113 (1990), this Court attempted to clarify how its holding in *Parratt* should be applied in analyzing procedural due process claims.[12] In explaining its grant of certiorari in *Zinermon*, this Court observed that "[s]everal Courts of Appeals have found *Parratt* inapplicable where the defendant state officials had the state-clothed authority to effect a deprivation and had the power to provide the plaintiff with a hearing before they did so," whereas "[o]ther Courts of Appeals have held that *Parratt* applies even to deprivations effected by the very state officials charged with providing predeprivation process." *Id.* at 116 n.2 (citing cases). This Court resolved the dispute in favor of the former position, holding that:

> petitioners cannot characterize their conduct as "unauthorized" in the sense the term is used in *Parratt* and *Hudson* [*v. Palmer*, 468 U.S. 517 (1984)]. The State delegated to them the power and authority to effect the very deprivation complained of here . . . and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement.

Id. at 138.

Narrowing even further the reach of *Parratt*, the *Zinermon* Court observed that "[i]n situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Id.* at 132.

Zinermon would appear to be dispositive of the *Parratt* issue in the instant case. To begin with, McKinney was deprived of his property interest in continued employment by the Board of County Commissioners, which, under the Osceola County Policy Manual, had "the power and au-

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[12] *Zinermon* made clear that *Parratt* has no application to substantive due process claims. 494 U.S. at 125; *see supra* note 9.

thority to effect the very deprivation complained of here," as well as "the concomitant duty to initiate the procedural safeguards," 494 U.S. at 138, established by the Policy Manual to guard against an unlawful deprivation. Nor were the Board members simply county employees to whom these duties had been delegated; they constituted rather the governing body of the political jurisdiction that employed McKinney. And, a predeprivation hearing was of course "feasible" here, inasmuch as a hearing in fact was held before McKinney's employment was terminated.[13]

A grant of certiorari is warranted in the instant case not simply because the Eleventh Circuit misread the teaching of *Parratt*, as amplified by *Zinermon*, but also because other courts of appeals have struggled with the application of those precedents. Thus, the Fourth Circuit has held that the conduct of state employees is not "unauthorized" within the meaning of *Parratt* when the state has delegated to those employees the authority to effect the deprivation in question, as well as the duty to initiate the procedural safeguards provided for by state law. *Plumer v. Maryland*, 915 F.2d 927, 931 (4th Cir. 1990). On the other hand, the Seventh Circuit has

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[13] The procedural flaw, as the Eleventh Circuit noted, was not the failure to provide a hearing at all, but rather the failure to satisfy the constitutional requirement to provide a hearing before an impartial decisionmaker. App. 18a.

Of course, a full evidentiary hearing before an impartial decisionmaker is not invariably required prior to termination of a public employee. Where the employer provides pretermination notice and an opportunity to respond, together with the opportunity for a constitutionally adequate post-termination hearing, the requirements of due process are satisfied. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Because McKinney was treated as a department head, however, he was afforded an evidentiary hearing by his employer *only* at the pretermination stage and had no entitlement to any post-termination process from his employer. *See supra* note 3. *Loudermill* therefore has no application to this case. *See, e.g., Swank v. Smart*, 898 F.2d 1247, 1256 (7th Cir.), *cert. denied*, 498 U.S. 853 (1990).

opined that even the acts of policymaking officials may be "unauthorized" if they deviate from an established procedure. *Easter House v. Felder*, 910 F.2d 1387, 1400-05 (7th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1067 (1991). Similarly, for the Fifth Circuit, "§ 1983 should not be employed to remedy deprivations which occur at the hands of even high ranking state employees 'who [are] acting in direct contravention of the state's established policies and procedures which have been designed to guarantee the very protections which the employee now has chosen to ignore.'" *Johnson v. Louisiana Dep't of Agriculture*, 18 F.3d 318, 322 (5th Cir. 1994) (quoting *Easter House*, 910 F.2d at 1404). And, in the instant case, the Eleventh Circuit held that *Parratt* was applicable because "any bias on the part of the Board was not sanctioned by the State and was the product of the intentional acts of the commissioners." App. 22a.[14]

There likewise is a conflict among the federal circuits with regard to the question of whether the feasibility of providing a predeprivation hearing is dispositive of the

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[14] It appears to follow from the Eleventh Circuit's holding—that *Parratt* is applicable here because "any bias on the part of the Board was not sanctioned by the State and was the product of the intentional acts of the commissioners," App. 22a—that the court believes *Parratt* to apply in *all* cases not covered by the holding of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (*Parratt* inapplicable when the facial adequacy of an "established state procedure" is challenged). This Court's cases do not support that view, particularly after *Zinermon*. Nonetheless, the Eleventh Circuit is not the only court to have flirted with the notion that *Logan* constitutes the only exception to the rule of *Parratt*. For example, the analysis of the Seventh Circuit in *Easter House*, *supra*, appears to reflect such a view, *see* esp. 910 F.2d at 1400-05; *see also id.* at 1411 (Cudahy, J., dissenting), and the Fifth Circuit has followed the Seventh in this regard. *Johnson*, 18 F.3d at 322. Thus, from one perspective, the *Parratt* issue presented by this case is whether a litigant is necessarily subject to the rule of *Parratt* if his claim is to have been deprived of property by governmental action contrary to, rather than consistent with, "established state procedure."

Parratt issue. Four circuits have held *Zinermon* to require that "[w]hen a government can provide a predeprivation hearing, the availability of a postdeprivation tort remedy does not satisfy the Due Process Clause." *Matthias v. Bingley*, 906 F.2d 1047, 1057, *modified*, 915 F.2d 946 (5th Cir. 1990); *Plumer*, 915 F.2d at 931; *Gentry v. City of Lee's Summit*, 10 F.3d 1340, 1344-45 (8th Cir. 1993); *Mackey v. Dyke*, 29 F.3d 1086, 1093 (6th Cir. 1994). On the other hand, the Eleventh Circuit in this case has deemed a predeprivation hearing to be "impracticable" whenever "the deprivation is the result of either a negligent or an intentional deprivation of property." App. 22a. Similarly, the principle that the feasibility of a predeprivation hearing is dispositive has been glossed over by the Seventh Circuit in *Easter House, supra*, and by the First Circuit in *Lowe v. Scott*, 959 F.2d 323, 340-44 (1st Cir. 1992).

In short, the Eleventh Circuit was off the mark when it stated in the *en banc* opinion that "[t]he precedent established by *Parratt* is unambiguous." App. 22a. Further guidance from this Court is warranted.

B. The Adequacy of McKinney's State-Court Remedy

If this Court concludes both that this case raises only procedural due process issues and that the doctrine of *Parratt* applies, disposition of the case will turn on the constitutional "adequacy" of the state-court remedy available to McKinney.

McKinney's remedy under Florida law was to file with the circuit court a petition for a common-law writ of certiorari, seeking a review of the Board's action pursuant to Fla. R. App. P. 9.030(c)(3). *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 625-26 (Fla. 1982); *Education Dev. Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals*, 541 So. 2d 106, 108 (Fla. 1989). While the circuit court's jurisdiction under these circumstances is mandatory rather than discretionary, *Cherokee Crushed*

Stone, Inc. v. City of Miramar, 421 So. 2d 684, 689 (Fla. Dist. Ct. App. 1982), and while the court is to determine, *inter alia*, "whether procedural due process is accorded," *Deerfield Beach*, 419 So. 2d at 626, the court is limited in making this determination to the record developed at the Board hearing. *Ragland v. State*, 46 So. 724, 725-26 (Fla. 1908); *cf.* Fla. Stat. § 120.68(4) (judicial review under Florida Administrative Procedure Act confined to the record); *Arlotta v. Florida Parole & Probation Comm'n*, 419 So. 2d 1159, 1160 (Fla. Dist. Ct. App. 1982) (same).[15]

This Court has not addressed the question of whether a post-termination state-court remedy that requires the employee to make his case solely on the basis of the evidence that he was allowed to present during an admittedly constitutionally inadequate pretermination hearing comports with the requirements of procedural due process. Because this is in its own right an important question of due process law, and because it is in addition integrally related to the application of *Parratt*, this Court should determine whether the post-termination remedy that was available to McKinney in the Florida state courts was constitutionally adequate.

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[15] Although the Eleventh Circuit disagreed with "McKinney's conclusion that Florida's process is inadequate," App. 23a, it did not specifically dispute his assertion that "the Florida courts' power to review is limited to the record before the Board." *Id.* The authorities cited in text confirm this limitation.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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APPENDIX A

[Filed May 5, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3416

(D.C. Docket No. 89-836-CIV-ORL-19)

MILLARD MCKINNEY,
Plaintiff-Appellee,

versus

JOHN PATE, individually and in his official capacity as Commissioner of the Osceola County Board of Commissioners, JACK SHANNIN, individually and in his official capacity as Development Department Director of Osceola County, and the OSCEOLA COUNTY BOARD OF COMMISSIONERS, collectively,
Defendants-Appellants,

Appeal from the United States District Court
for the Middle District of Florida

(May 5, 1994)

Before TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK and CARNES, Circuit Judges.*

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* Senior U.S. Circuit Judge Fay, who was a member of the en banc court which heard oral argument in this case, took senior status on January 19, 1994, and therefore did not participate in this decision.

Judge Barkett became a member of the court after October 19, 1993, when this case was argued and taken under submission. She has elected not to participate in this decision.

TJOFLAT, Chief Judge:

This case presents the following issue: whether, under the Fourteenth Amendment, a government employee possessing a state-created property interest in his employment states a substantive due process claim, rather than a procedural due process claim, when he alleges that he was deprived of that employment interest by an arbitrary and capricious non-legislative government action. For ten years, as a panel of this court noted in this case,[1] the law of this circuit has been that an employee alleging such a termination states a substantive due process claim. This circuit's law, however, diverges from Supreme Court precedent and affords protection not provided by the substantive component of the Fourteenth Amendment's Due Process Clause. Today, we return this circuit's due process jurisprudence to a proper footing and hold that the government action contested here does not give rise to a substantive due process claim.

In part I, we set forth the facts and procedural history of this case. In part II, we first discuss the Supreme Court's due process jurisprudence and then demonstrate how this circuit's cases have diverged from that established law. After demonstrating in part III that the claim in this case implicates only procedural due process guarantees, we find in part IV that the procedures here afforded satisfied constitutionally mandated minima. Finally, we find that this holding applies retroactively and requires the dismissal of appellant's claim.[2]

I.

Appellant Millard McKinney, the plaintiff below, obtained a position as the County Building Official in Osceola

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[1] *McKinney v. Pate*, 985 F.2d 1502 (11th Cir.), *opinion vacated*, 994 F.2d 772, 773 (11th Cir. 1993).

[2] We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (1988).

County, Florida, on July 27, 1987.[3] The Building Division is one of three divisions within the Osceola County Development Department. Jack Shannin, the Director of the Development Department, hired McKinney and was McKinney's immediate supervisor; Shannin reported to County Administrator Eleanor Anderson.

Prior to McKinney's hiring, both the Building Division and the Development Department had been the subject of numerous public complaints; in part, McKinney was hired to address the public's dissatisfaction with the Building Division. To address ongoing problems in the Development Department and the Building Division, at least two public "workshops" were held during McKinney's tenure. Both prior to and subsequent to these hearings, McKinney's performance evaluations were excellent.

In November 1988, John Pate was elected to serve as one of the five commissioners on the Osceola County Board of County Commissioners ("the Board"). Because the public often directed complaints regarding the administration of the county's governmental business to the Board, not to individual departments, each commissioner also served as a liaison between the Board and a department; Pate's liaison duties included Shannin's Development Department (and, indirectly, McKinney's Building Division). McKinney alleges that members of the Board —particularly Pate, who in addition to his position as a county commissioner was employed by a construction subcontractor—were biased against McKinney because of McKinney's strict enforcement of the county's building codes. The Board allegedly informed County Administrator Anderson that McKinney was to be fired; Anderson in turn instructed Shannin to fire McKinney, asserting political motivations of the commissioners as justification.

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[3] Because this appeal challenges the district court's entry of judgment notwithstanding the verdict, we view the evidence set before the jury in the light most favorable to appellant McKinney.

Shannin twice informed McKinney that he should resign or he would be fired; McKinney refused to resign.

McKinney was a full-time permanent employee of Osceola County. The Osceola County Policy Manual provides that "[a] permanent employee may be dismissed only for cause as outlined in the Code of Conduct and Disciplinary Procedures and this policy." In this case, "cause" would be defined as "incompeten[ce] or inefficienc[y] in carrying out [his] duties." The policy manual also outlines the procedures by which an employee may be terminated and divides employees into two categories: normal employees and "department heads." The termination procedures for department heads involve more procedural protection for the employee. As it was unclear whether McKinney, as County Building Official, qualified as a "department head," the county elected to afford him the maximum amount of process possible and followed the procedures for the termination of a department head.

After McKinney refused to resign, Shannin began the termination process by drafting a "Notice of Reasons for Proposed Termination of Millard McKinney" setting forth thirteen charges against McKinney, each of which presumably justified McKinney's dismissal.[4] Immediately thereafter, the Board of County Commissioners held three days of hearings regarding the charges against McKinney.

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[4] The Notice alleged that McKinney had failed to provide direction to his department and that, as a result, the performance of the Building Division staff was deficient. Specifically, the Board cited the staff's poor productivity and lack of enthusiasm for its work, its negligence in answering phones, and its wrongful issuance of permits. In addition, the Board's reasons included statements concerning the poor performance of building inspectors and assertions that McKinney had exceeded limits placed on his budget and his authority. Finally, the document mentioned—as an "incidental"—that "Mr. McKinney used very poor judgement [sic] in the building of his house" by building a home not approved by the Plans Examiner; however, the Board stated, "except for poor judgement [sic], this [charge] is not included as part of [the Board's] disciplinary procedure."

McKinney, who was aware of the bias he now alleges against Pate, attended the hearings with counsel (as well as with a court reporter). The county's labor attorney presented the case against McKinney, and McKinney cross-examined the county's witnesses and presented a case on his own behalf. (With the exception of his charge of bias, McKinney has not claimed that any of the procedures relevant to his termination were in any way deficient.) At the conclusion of the hearings, the Board upheld each of the charges and terminated McKinney's employment.

On October 11, 1989, McKinney brought this suit in the United States District Court for the Middle District of Florida. His complaint contained two counts; only the first count is before us.[5] That count, brought pursuant to 42 U.S.C. § 1983 (1988), alleged that the various charges against McKinney were pretextual and that the Board therefore fired McKinney without reason. McKinney alleged that this pretextual termination violated his "constitutional employment rights" and consequently denied him substantive due process of law. McKinney sought money damages for past and future lost wages and benefits; for injury to his liberty interest in his good name and reputation; and for severe emotional distress.[6]

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[5] Count two, against Pate and Shannin, was a pendant state claim under Florida law for wrongful injury to McKinney's employment. The district court disposed of this count on defendants' motion for summary judgment; it is not before us on appeal. Pate and Shannin were defendants—along with the Board—to the first count of McKinney's complaint as well; once the court granted summary judgment in favor of Pate and Shannin on Count two, however, McKinney voluntarily dismissed them from the first count and thus from the case. This action left the Board as the only defendant in the case.

[6] McKinney also sought equitable relief in the form of reinstatement to his position with back-pay and benefits. McKinney did not pursue this claim in the district court (choosing instead to recover compensation at the hands of the jury for his claimed injuries); accordingly, his claim for equitable relief is not before us.

The Board's answer to the first count of McKinney's complaint, the substantive due process claim, denied McKinney's allegations and interposed as an affirmative defense the failure of the count to state a claim for relief. Following discovery, the Board moved for summary judgment based on that affirmative defense. The district court denied the motion and the case proceeded to trial on McKinney's substantive due process claim. The jury returned a verdict for McKinney in the amount of $145,000. Thereafter, the Board moved for judgment notwithstanding the verdict and, on April 8, 1991, the district court granted the Board's motion, set aside the verdict, and entered judgment for the Board. It is from this judgment that McKinney appeals.

After oral argument, a panel of this court vacated the district court's judgment and reinstated the jury's verdict. *McKinnney v. Pate*, 985 F.2d 1502 (11th Cir. 1993). Two judges specially concurred; they noted that, but for this circuit's precedent (which may be overruled only by the court sitting *en banc, see Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc)), they would have affirmed the district court. *McKinney*, 985 F.2d at 1507 (Tjoflat, C.J., and Cox, J., specially concurring). The full court ordered the case reheard en banc and consequently vacated the panel's opinion. *McKinney v. Pate*, 994 F.2d 772, 773 (11th Cir. 1993).

II.

A.

The Due Process Clause of the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Supreme Court's interpretation of this clause explicates that the amendment provides two different kinds of constitutional protection: procedural due process and substantive due process. *Cf. Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975,

983 (1990). A violation of either of these kinds of protection may form the basis for a suit under section 1983. *Id.*

1.

The substantive component of the Due Process Clause protects those rights that are "fundamental," that is, rights that are "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937).[7] The Supreme Court has deemed that most—but not all—of the rights enumerated in the Bill of Rights are fundamental; certain unenumerated rights (for instance, the penumbral right of privacy, *see Planned Parenthood v. Casey*, —— U.S. ——, ——, 112 S.Ct. 2791, 2807 (1992)) also merit protection. It is in this framework that fundamental rights are incorporated against the states.[8] A finding that a right merits

[7] An alternate substantive due process test finds a violation if the questioned governmental action "shocks the conscience" of federal judges. *Cf. Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952). The *Rochin* standard has no place in a civil case for money damages. *See, e.g., Gilmere v. City of Atlanta*, 774 F.2d 1495, 1511 n.21 (11th Cir. 1985) (en banc) (Tjoflat, J., concurring in part and dissenting in part), *cert. denied*, 476 U.S. 1115, 106 S.Ct. 1970 (1986).

In *Rochin*, a convicted defendant claimed that his right to a fair trial was violated because improperly seized evidence—evidence seized in a fashion that would "shock the conscience"—was admitted at trial against him. The Court held that the evidence could not be admitted; the Court therefore reversed the conviction. Thus, *Rochin* in no way created a substantive right on which claimants might claim civil damages.

[8] Incorporation, which we consider to be a subset of the substantive component of the Due Process Clause, also may be considered a third, distinct constitutional protection supplementing procedural due process and substantive due process. When the Supreme Court has ruled that a right based in the Bill of Rights should be incorporated against the states, however, the Court effectively has determined that the questioned right is, in Justice Cardozo's famous phrase, "implicit in the concept of ordered liberty." *Palko*, 302 U.S. at 325, 58 S.Ct. at 149. Because it is

substantive due process protection means that the right is protected "against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. City of Harker Heights,* —— U.S. ——, ——, 112 S.Ct. 1061, 1068 (1992) (quoting *Daniels v. Williams,* 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986)).

Although the Supreme Court has extended substantive due process protection to certain unenumerated rights, it has not extended Fourteenth Amendment coverage to a host of other areas. In fact,

> the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins, —— U.S. at ——, 112 S.Ct. at 1068 (citation omitted). Hence, remaining largely outside the scope of substantive due process jurisprudence are tort law, *see Daniels,* 474 U.S. at 332, 106 S.Ct. at 665, and public employment law, *see e.g., Bishop v. Wood,* 426 U.S. 341, 350, 96 S.Ct. 2074, 2080, 48 L.Ed.2d 684 (1976), *and Board of Regents v. Roth,* 408 U.S. 564, 577-78, 92 S.Ct. 2701, 2709-10, 33 L.Ed.2d 548 (1972).

In short, areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because "sub-

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"implicit," we believe the right necessarily merits protection under the substantive component of the Due Process Clause.

In any event, we quickly can dispose of any notion that McKinney's claim is based on an incorporated right. McKinney asserted no such right in the district court; in addition, the facts indicate that no freedom protected by the Bill of Rights is implicated.

stantive due process rights are created only by the Constitution." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229, 106 S.Ct. 507, 515 (1985) (Powell, J., concurring). As a result, these state law based rights constitutionally may be rescinded so long as the elements of procedural—not substantive—due process are observed.

2.

Substantive due process rights differ from their procedural counterparts in a second, important fashion: the manner in which a violation of the right occurs. A violation of a substantive due process right, for instance, is complete when it occurs; hence, the availability *vel non* of an adequate post-deprivation state remedy is irrelevant. Because the right is "fundamental," no amount of process can justify its infringement.[9] By contrast, a procedural

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[9] When discussing substantive due process protection in this opinion, it is crucial to note the distinction between "legislative" acts and "non-legislative" or "executive" acts, *see Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7, 99 S.Ct. 2100, 2104 (1979).

Executive acts characteristically apply to a limited number of persons (and often to only one person); executive acts typically arise from the ministerial or administrative activities of members of the executive branch. The most common examples are employment terminations, *e.g.*, *Roth*, 408 U.S. at 5066, 92 S.Ct. at 2703. (The substantive/procedural distinctions we discuss in this opinion are appropriate to cases—like this one—involving non-legislative acts).

Legislative acts, on the other hand, generally apply to a larger segment of—if not all of—society; laws and broad-ranging executive regulations are the most common examples. The analysis, and the substantive/procedural distinction discussed above, that is appropriate for executive acts is *inappropriate* for legislative acts. For instance, only when addressing legislative acts has the Supreme Court mandated that states must demonstrate that they are violating private interests only as necessary to promote state interests. *See, e.g.*, *Foucha v. Louisiana*, —— U.S. ——, ——, 112 S.Ct. 1780, 1804 (1992) (Thomas, J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841 (1986); *Roe v. Wade*, 410

due process violation is not complete "unless and until the State fails to provide due process." *Zinermon*, 494 U.S. at 123, 110 S.Ct. at 983. In other words, the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise.

3.

A final distinctive characteristic of substantive due process rights is the typical remedy awarded to one whose rights have been violated. In substantive due process cases, the claimant seeks compensatory damages for the value of the deprived right.[10] In procedural due process

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U.S. 113, 93 S.Ct. 705 (1973). A similar balancing test is not found in executive-act cases. Legislative-act cases therefore are distinguishable from the case at hand.

The Supreme Court's decision in *Harrah Ind. School Dist. v. Martin*, 440 U.S. 194, 99 S.Ct. 1062 (1979), on which McKinney relies, is not to the contrary. There, the School Board instituted a new, prospective rule that precluded renewal of the contracts of teachers who refused to take continuing education courses. Martin refused to take the courses, the School Board refused to renew her contract, and Martin sued, alleging a substantive due process violation. Even though the School Board had applied its rule only to Martin, the Supreme Court examined the case as one involving a legislative act; hence, the Court analyzed the rule itself, not the School Board's application of the rule to Martin. *Id.* at 198-99, 99 S.Ct. at 1064. Using a balancing test, the Court concluded that there was a rational connection between the School Board's action (the adoption of the rule, not the application of the rule to Martin) and the School Board's interest in providing its students with well-trained teachers; hence, there was no substantive due process violation. Like all legislative-act cases, then, *Harrah* is distinguishable from McKinney's case.

[10] The substantive due process deprivation therefore may be likened to a Fifth Amendment "taking." In the typical takings case, the government condemns private property and must compensate the property's owner for the value of the property taken. In a substantive due process deprivation, by comparison, the gov-

cases, however, although the claimant may seek compensatory damages, the primary relief sought is equitable: for instance, in an employment case, the claimant typically seeks reinstatement and a properly conducted pre-termination hearing.[11] These process-based remedies are unique to procedural due process rights and, because of the definition of a substantive due process right as one which may not be violated regardless of the process, may not be awarded to one claiming a substantive due process violation. Because the relief awarded to a person claiming a substantive due process violation primarily is monetary, not equitable, a substantive due process deprivation likely is of substantially greater monetary value than a procedural due process deprivation.[12]

B.

The Eleventh Circuit has considered a number of "substantive" due process employment termination cases in the last ten years.[13] The first clear indication that we would

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ernment has deprived a person of a property or liberty interest and must compensate the interest's owner for the value of the interest taken. In employment cases, if a substantive due process claim lies, the value is measured in terms of lost wages and benefits (both past and future).

[11] Of course, if the claimant elects not to seek a remedial hearing, no compensatory damages may be awarded either.

[12] In this case, treating McKinney's loss of employment as a deprivation of a substantive, rather than a procedural, due process right resulted in a substantial monetary award—$145,000; McKinney recovered the wages lost from the date of his termination to the date of his anticipated retirement (in conformance with the district court's instruction to the jury). Had the loss been treated as a deprivation of procedural due process, however, McKinney's monetary recovery would have been limited to the wages lost from the time of his termination through the time of the court's judgment. That recovery could have been supplemented, however, with equitable relief (such as reinstatement).

[13] We have resolved other, similar, cases through procedural reasoning, asking whether the employee had a state-created en-

recognize a substantive due process violation for the pretextual termination of a state employee came in *Hearn v. City of Gainesville*, 688 F.2d 1328 (11th Cir. 1982). The *Hearn* panel found that the Due Process Clause was implicated when the head of the city's personnel department arranged the elimination of the plaintiff's position in order to terminate him without cause:

> [T]he layoff was a phony arrangement, carried out for an improper motive, to deprive Hearn of his job. This states a substantive due process violation —deprivation of a property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and, because unrelated to the proper reasons for layoff, without any rational basis.

Id. at 1332 (citing *Nebbia v. New York*, 291 U.S. 501, 525, 54 S.Ct. 505, 510, 78 L.Ed. 940 (1933) ("[T]he

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titlement to the job, and, if so, whether the state had provided constitutionally adequate procedures before termination. *See, e.g., Lee v. Hutson*, 810 F.2d 1030, 1032-33 (11th Cir. 1987) (finding that allegations of numerous procedural defects did not make out a substantive due process claim).

In teacher termination cases involving allegations of violations of both procedural and substantive due process, we have inquired "whether the procedures followed by the school authorities comported with due process requirements, and, if so, whether the action taken is supported by substantial evidence." *Holley v. Seminole County Sch. Dist.*, 755 F.2d 1492, 1496 (11th Cir. 1985) (quoting *Viverette v. Lurleen B. Wallace State Junior College*, 587 F.2d 191, 193 (5th Cir. 1979)); *see also Hatcher v. Board of Pub. Educ.*, 809 F.2d 1546, 1552 (11th Cir. 1987). The first prong of this test involves constitutional assessment of the procedures used to effect the termination. The second prong, a "limited substantive review," assures that there is "substantial evidence" for the decision and, thus, "a rational basis for the deprivation of an individual's property." *Holley*, 755 F.2d at 1499. This is an appropriate, essentially procedural, review of the sufficiency of the evidence. It is unfortunate, however, that we have invited litigants to allege violations of *substantive* due process in order to trigger this analysis.

guaranty of due process . . . demands . . . that the law shall not be unreasonable, arbitrary or capricious.")).[14]

A second panel visited the issue some six months later in *Barnett v. Housing Auth. of Atlanta*, 707 F.2d 1571 (11th Cir. 1983). The plaintiff asserted that his termination was an attempt "to make him a sort of scapegoat" in response to an incident that embarrassed the Board of Commissioners of the Atlanta Housing Authority. The court affirmed the judgment entered on the jury verdict in the plaintiff's favor, finding the pretextual nature of the firing to be a violation of the plaintiff's substantive due process rights. *Id.* at 1577-78.

The rule was applied most recently in *Adams v. Sewell*, 946 F.2d 757 (11th Cir. 1991). In that case, the panel found a substantive due process violation where a county alleged "improper management techniques" as the basis for discharge rather than admit that the employee was being fired because of allegations that he had sexually harassed another employee. *Id.* at 767.

The Eleventh Circuit law of "substantive" due process in the government employment setting is clear. "A violation of a public employee's right to substantive due process occurs when an employer deprives the employee of a property interest for an improper motive and by means that [are] pretextual, arbitrary and capricious, regardless of whether or not a hearing was held." *Nolin v. Douglas County*, 903 F.2d 1546, 1553-54 (11th Cir. 1990) (internal quotation marks omitted); *see also Barnett*, 707 F.2d at 1577; *Hearn*, 688 F.2d at 1332; *Adams*, 946 F.2d at 766; *Kelly v. Smith*, 764 F.2d 1412, 1413 (11th Cir. 1985). The plaintiff must show (1) a deprivation

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[14] The latent confusion between legislative and non-legislative (or executive) acts, see *supra* note 9, is made manifest in *Hearn*. In that case, where a terminated employee challenged an executive act, we cited *Nebbia*, where a legislative act (to wit, a law) was at issue. It is imperative that a stricter segregation of these two distinct case-categories be maintained.

of a state law property right in continued employment (2) made through pretextual means to disguise an improper motive.

C.

Satisfaction of these requirements will not make out a substantive due process claim under the jurisprudence of the Supreme Court, however, because only *procedural* issues are implicated. Whether an individual complains that a state lacks constitutionally adequate procedures for termination of employees or asserts that his particular hearing was not fair and impartial, he has raised only procedural due process concerns.

The clearest demonstration of the error of this court's precedent results from an examination of *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074 (1976). In that case, a police officer who had been terminated without a hearing claimed that he had been deprived of both a property interest (his employment status) and liberty interests (freedom from public stigma and freedom from pretextual termination). The Court first examined North Carolina law and concluded that the policeman had no property interest protected under the Fourteenth Amendment. *Id.* at 344-47, 96 S.Ct. at 2077-79. The Court also disposed of the policeman's first claimed liberty interest, freedom from public stigma, because the reasons for his termination were not made public. *Id.* at 348-49, 96 S.Ct. at 2079. Finally—and most importantly—the Court addressed the policeman's second claimed liberty interest, freedom from pretextual termination. The Court concluded that the allegedly pretextual termination did not raise a liberty interest:

> The truth or falsity of the City Manager's statement determines whether or not his decision to discharge the petitioner was correct or prudent, but neither enhances nor diminishes petitioner's claim that his constitutionally protected interest in liberty has been impaired.
>
> . . .

> Indeed, the impact on petitioner's constitutionally protected interest in liberty is no greater even if we assume that the City Manager deliberately lied. Such fact might conceivably provide the basis for a state-law claim, the validity of which would be entirely unaffected by our analysis of the federal constitutional question.

Id. at 349 and n. 13, 96 S.Ct. at 2079-80 and n. 13. In other words, even if the ostensible reasons for the policeman's termination were entirely false and pretextual, no Fourteenth Amendment claim could be raised. The Supreme Court concluded with a firm statement that state employment decisions are not covered by its substantive due process jurisprudence:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Id. at 349-50, 96 S.Ct. at 2080 (footnote omitted).

A decade after *Bishop*, the Supreme Court addressed the issue of whether the Fourteenth Amendment provided protection to employees who did possess a property right in their positions (unlike the policeman in *Bishop* who did not possess such a property right). In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487

(1985), two employees, who could not be dismissed under Ohio law except for "misfeasance, malfeasance, or nonfeasance in office," were terminated. The Court concluded that each had a property right in continued employment and therefore was entitled to the protection of *procedural* due process. *Id.* at 539, 541, 105 S.Ct. at 1491, 1493.

When these cases are examined, it becomes evident that the law in this circuit diverges from Supreme Court precedent in three distinct and important ways. First, unlike our cases, Supreme Court precedent demonstrates that an employee with a property right in employment is protected only by the procedural component of the Due Process Clause, not its substantive component. Because employment rights are state-created rights and are not "fundamental" rights created by the Constitution, they do not enjoy substantive due process protection.

The second error in this circuit's law is that it allows a terminated employee to sue in federal court under section 1983 before the employee utilizes appropriate, available state remedial procedures. When a state procedure is inadequate, no procedural due process right has been violated unless and until the state fails to remedy that inadequacy. *Zinermon*, 494 U.S. at 123, 110 S.Ct. at 983. By converting pretextual terminations into substantive due process violations, however, our circuit's law forecloses the state's ability to remedy the procedural failings of its subdivisions and agencies in the appropriate fora—agencies, review boards, and state courts. In effect, our pretextual termination case law grants federal jurisdiction to cases that, for practical and legal purposes, are not yet "ripe."

Finally, this circuit's law provides an inappropriate remedy to pretextually terminated employees. As we state above, the appropriate remedy for a pretextual termination is not damages calculated on the employee's potential earnings for the rest of his or her working life, but rather

procedural, equitable remedies: reinstatement and a directive that proper procedures be used in any future termination proceedings.

The Supreme Court's analysis clearly distinguishes between procedural and substantive due process rights, violations, and remedies. To date, however, our cases have confused these two categories and incorrectly placed the claims of pretextually terminated employees on the substantive due process side of the ledger. Today, however, we hold that, in non-legislative cases, only procedural due process claims are available to pretextually terminated employees. Thus, we conclude that our prior decisions, which granted pretextually terminated employees section 1983 causes of action premised on substantive due process violations, are contrary to Supreme Court jurisprudence; to the extent they are contrary to the holding of this opinion, they are overruled.[15]

III.

When this appropriate standard is applied to McKinney's allegations, we find that those allegations support only a procedural due process claim. In reaching this conclusion, we first note that McKinney styled Count I of his complaint "Substantive Due Process." Our responsibility, however, is to examine McKinney's cause of action for what it actually is, not for what McKinney would have it be. We therefore afford McKinney's denomination of the issue no weight.

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[15] As the text indicates, we are not using this case to eviscerate all of our substantive due process precedent. As we discuss above, there continue to be rights that a state may not remove, regardless of the process, as well as actions that can not be countenanced, regardless of the appropriateness of the process. For instance, actions such as those in *Gilmere*, 774 F.2d 1495 (11th Cir. 1985) (finding substantive due process violation in case in which police officers beat, shot, and killed individual in making arrest), still are subject to suit under section 1983 based on substantive due process grounds; those holdings are not affected by this case.

What do deserve weight are the facts upon which McKinney builds his claim. In his complaint, McKinney contends that, "by merely 'going through the motions' of an ostensibly unbiased post-termination hearing in the course of [its] attempt[] to discharge McKinney without proper cause," the County arbitrarily and capriciously deprived McKinney of his employment; in so doing, McKinney asserts, the County violated McKinney's due process rights. McKinney does not deny that the County followed a *facially* adequate procedure; in fact, but for his allegations of bias, McKinney acknowledges that there were no failures of process. McKinney's only contentions are that the facially adequate procedure was biased against him and that the Board was preordained to find against him, regardless of the evidence. On its face, then, McKinney's allegation is procedural: the County failed to provide one of the elements of procedural due process—an unbiased decisionmaker.

Our conclusion that McKinney's claim implicates procedural—and not substantive—due process protection garners support from an application of the Supreme Court's due process standards. First, as we discuss above, employment rights are *not* absolute. *See Roth*, 408 U.S. at 569-70, 92 S.Ct. at 2705; *Perry v. Sindermann*, 408 U.S. 593, 599, 92 S.Ct. 2694, 2698 (1972). Rather, an employee's right to employment may be abridged as long as the procedures used to abrogate that right satisfy constitutional minima. In addition, although we acknowledge that McKinney's allegations—if true—would be lamentable, we nonetheless cannot find that, under *Palko*, McKinney's right to employment is so fundamental that our democratic society and its inherent freedoms would be lost if that right were to be violated. *See Harrah*, 440 U.S. at 198, 99 S.Ct. at 1064. As such, we likewise cannot find that McKinney's state-created property right is deserving of substantive due process protection.

Moreover, the appropriate forum for addressing McKinney's claim is not federal court but a Florida state

court possessing the ability to remedy the alleged procedural defect; that forum might well have prevented a violation of McKinney's procedural due process rights and thereby obviated the need for this suit. Finally, the appropriate remedy in this case is not lost wages and benefits calculated on the basis of McKinney's remaining working life; rather proper remedies include reinstatement and the correction of any procedural defects in the means by which McKinney was terminated.

As a result, we must analyze McKinney's claims in terms of procedural due process considerations. *Accord Burney v. Polk Community College*, 728 F.2d 1374 (11th Cir. 1984); *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1081, 109 S.Ct. 1535 (1989).

IV.

Having determined that McKinney's claim raises procedural, not substantive, issues, our next task is to determine whether the procedure afforded McKinney satisfied constitutionally mandated due process minima.

A.

It is axiomatic that, in general, the Constitution requires that the state provide fair procedures and an impartial decisionmaker before infringing on a person's interest in life, liberty, or property. More specifically, the Supreme Court has explained that a "tenured employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" before a state or state agency may terminate an employee. *Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495. In other words, the employee is entitled to "some kind" of pretermination hearing. *Id.* at 542, 105 S.Ct. at 1493. That hearing is not a mini-trial and "need not definitely resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe

that the charges against the employee are true and support the proposed action." *Id.* at 545-46, 105 S.Ct. at 1495.

McKinney acknowledges that he received written notice of the charges against him; at the Board hearing, he also heard an explanation of the Board's evidence; finally, with the assistance of counsel, he had the opportunity to present his side of the story through witnesses, evidence, and argument. He thus received a pre-termination hearing and, with it, all the process due under *Loudermill.* Our task is to determine whether McKinney's allegation of bias demonstrates that he did not receive due process.

B.

1.

An allegation of bias may arise in either of two scenarios: in the first, the challenger learns of the decisionmaker's alleged bias prior to or during the proceeding; in the second, the challenger learns of the decisionmaker's alleged bias only after the proceeding has terminated. To address these mutually exclusive scenarios, courts provide distinct procedures that afford the challenger an opportunity to address the alleged bias as well as to remedy outcomes that are tainted by bias.

In the first scenario, that of the contemporaneously recognized bias, courts usually require that the challenger contemporaneously object to the bias. Thus, when faced with a supposedly biased venireperson in a criminal case,[16] for instance, the defendant must object to the biased individual during *voir dire,* either by a challenge for cause or by a peremptory strike; if the defendant fails to object to the biased individual at this preliminary stage, the objection is deemed waived. Similarly, a challenger must object to a biased judge in a motion to recuse

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[16] It cannot be disputed that criminal defendants often face losses of liberty significantly greater than the loss of employment rights McKinney claims.

before trial or as soon as the alleged bias is discovered; again, the penalty for failing timely to object is waiver of the objection.

In the second scenario, the alleged bias is discovered after the proceeding has concluded; a contemporaneous objection therefore is impossible. Due process requires that the challenger have an opportunity to object to the alleged bias, and courts consequently have instituted procedures to address allegations of bias and to set aside bias-tainted outcomes. Typically, courts require that the challenger meet a threshold test of demonstrating harm or prejudice resulting from the alleged bias before they will reopen a closed case. *See Lockett v. Blackburn,* 571 F.2d 309, 314 (5th Cir.) (holding, in habeas corpus case filed by state prisoner, that deliberate concealment of named eyewitness by prosecution constitutes prima facie deprivation of due process), *cert. denied,* 439 U.S. 873, 99 S.Ct. 207 (1978);[17] *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450 (1954). Absent a demonstration of prejudice, the challenger's allegations are discounted.

2.

In both situations, due process is satisfied when the challenger has an opportunity to present his allegations and to demonstrate the alleged bias. A demonstration that the decisionmaker was biased, however, is not tantamount to a demonstration that there has been a denial of procedural due process. As we mention above, unlike substantive due process violations, procedural due process violations do not become complete "unless and until the state refuses to provide due process." *Zinermon,* 494 U.S. at 123, 110 S.Ct. at 983. More specifically, in the case of an employment termination case, "due

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[17] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all cases decided by the Fifth Circuit before close of business on September 30, 1981.

process [does not] require the state to provide an impartial decisionmaker at the pre-termination hearing. The state is obligated only to make available 'the means by which [the employee] can receive redress for the deprivations.' " *Schaper v. City of Huntsville,* 813 F.2d 709, 715-16 (5th Cir. 1987) (quoting *Parratt v. Taylor,* 451 U.S. 527, 543, 101 S.Ct. 1908, 1917 (1981)) (footnote omitted).

In *Parratt* (and its progeny, *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194 (1984)), the Supreme Court held that due process did not require pre-deprivation hearings where the holding of such a hearing would be impracticable, that is, where the deprivation is the result of either a negligent or an intentional deprivation of property. All that due process requires, the Court said, is a post-deprivation "means of redress for property deprivations satisfy[ing] the requirements of procedural due process." *Parratt,* 451 U.S. at 537, 101 S.Ct. at 1914; *accord Hudson,* 468 U.S. at 533, 104 S.Ct. at 3204.

The precedent established by *Parratt* is unambiguous: even if McKinney suffered a procedural *deprivation* at the hands of a biased Board at his termination hearing, he has not suffered a *violation* of his procedural due process rights unless and until the State of Florida refuses to make available a means to remedy the deprivation. As any bias on the part of the Board was not sanctioned by the State and was the product of the intentional acts of the commissioners, under *Parratt,* only the state's refusal to provide a means to correct any error resulting from the bias would engender a procedural due process violation. It is to an examination of this state remedy—and a determination of whether it satisfies due process—that we now turn.

3.

In this case, McKinney failed to take advantage of any state remedies, opting instead to pursue his claim in

federal court.[18] In his en banc brief, McKinney asserts that the state remedy—review by Florida courts—is insufficient, largely because the statute of limitations for certiorari petitions of termination cases is significantly shorter than that for torts. McKinney also states that the state court procedure is deficient because the Florida courts' power to review is limited to the record before the Board. We disagree with McKinney's conclusion that Florida's process is inadequate.

First, Florida courts indeed do have the power to review employment termination cases. Inherent in that power to review is the power to remedy deficiencies and to cure violations of due process. Therefore, the Florida courts have the authority to order the relief to which McKinney claims to be entitled—a new hearing conducted by fair tribunal. *See, e.g., Elder v. Highlands County Bd. of County Comm'rs*, 497 So.2d 1334, 1335 (Fla. 2d Dist. Ct. App. 1986); *Seminole County Bd. of County Comm'rs v. Long*, 422 So.2d 938, 942 (Fla. 5th Dist. Ct. App. 1982), *pet. denied*, 431 So.2d 989 (Fla. 1983).

Second, the scope of the Florida courts' review encompasses the claim McKinney brought in federal court—that he was denied due process because of a partial decisionmaker. The Florida circuit courts, on certiorari review, possess broad powers of review:

> Where a party is entitled as a matter of right to seek review in the circuit court . . . , the circuit court *must* determine whether procedural due process is accorded . . . and whether the administrative findings and judgment are supported by competent substantial evidence.

City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982) (emphasis added). In other words, the

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[18] Significantly, McKinney did not allege in his complaint that the state procedures were inadequate.

Florida circuit courts "[r]eview[] the entire cause [and] consider[] . . . every aspect" of the case to determine whether due process was observed, *Long*, 422 So.2d at 941; McKinney, therefore, had an available, adequate remedy in the state system. The Florida courts' review, which "partakes more of the nature of an original judicial proceeding (which it is) than of a classic appeal of a lower judicial tribunal," *id.* at 942, more than satisfies *Parratt*'s post-termination process requirement.[19]

Finally, McKinney's state remedy is adequate. The Supreme Court held in *Parratt* that the state's remedial procedure need not provide all relief available under section 1983; as long as the remedy "could have fully compensated the [employee] for the property loss he suffered," *Parratt*, 451 U.S. at 544, 101 S.Ct. at 1917, the remedy satisfies procedural due process. The Florida courts possess the power to remedy McKinney's loss both in terms of damages and equitable relief; as such, the Florida procedures satisfy procedural due process and alleviate any deprivation McKinney may have suffered at the hands of the Board.

We therefore conclude that McKinney's state remedy was capable of providing McKinney with all the relief warranted. Even if McKinney's bias allegations are true, the presence of a satisfactory state remedy mandates that

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[19] In analyzing the scope of review adopted by Florida circuit courts (the trial courts of general jurisdiction), the *Long* court distinguished between county court judgments, which are "presumed to have been correctly reached in an impartial and detached judicial forum," and administrative actions, which are "entitled to *none* of the deference due initial judicial action[s]." *Id.* at 942 (emphasis added). The court also noted that separation of powers principles mandated that the judicial branch conduct a full review of executive action in order "to prevent arbitrary fact-finding and actions by the executive." *Id.* Given this heightened concern on the part of the Florida courts for ensuring that the executive branch accords an employee due process, McKinney's plaint that he is without a remedy in the Florida courts rings hollow.

we find that no procedural due process violation occurred.[20]

C.

Creating a substantive due process right in pretextual termination cases has two detrimental consequences. First, our past substantive due process jurisprudence provides terminated employees with more protection than criminal defendants whose liberty—and sometimes whose life—is at stake. As we mention above, criminal defendants must make contemporaneous objections to suspected bias on the part of the judge or a member of the jury; otherwise, the objection is considered waived. By allowing pretextually terminated employees to bring substantive due process cases, however, we encourage employees to sandbag the decisionmaker by pocketing their objections and then use them as part of a section 1983 case for damages. This policy also is wasteful of judicial resources (as objections which could be resolved easily before the original decisionmaker promulgate costly and unnecessary litigation and appeals in federal court); this is particularly true since the federal courts often will possess an incom-

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[20] Judge Hatchett, citing *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), asserts, concurring specially in the court's opinion, that a claimant need not seek relief in state court before repairing to federal court; he thus correctly rejects any intimation of an "exhaustion" requirement that might be read into today's decision. *Patsy* and the exhaustion doctrine it espouses, however, are inapposite to this case.

In *Patsy*, the Supreme Court held that Section 1983 plaintiffs were not required to avail themselves of available state remedies before suing in federal court; the Court's holding presumed the presence of a valid constitutional claim. In this case, however, McKinney cannot state a valid constitutional claim under *Parratt* and *Bishop* because Florida provides an adequate process to remedy McKinney's alleged injury. McKinney's case fails, therefore, not for want of exhaustion; indeed, exhaustion is irrelevant to our decision and finds no mention in the opinion. Rather, McKinney's case fails because he fails to state a procedural due process claim under *Parratt* and its progeny that would give rise to a Section 1983 suit.

plete record on which to resolve section 1983 cases specifically because the employee failed to raise objections before the decisionmaker and thereby create the necessary factual record. It is apparent that a policy which affords terminated employees greater procedural protection than that afforded criminal—even capital—defendants is misguided.

The second detrimental side effect of our past policy concerns the operation of local governments. By subjecting local officials to indiscriminate blindsiding by their employees (as well as to Monday morning quarterbacking by federal courts), we encourage them not to fire anyone for fear of the resulting federal suit. Our policy also deters individuals from serving in local government, since they know that their decisions—as well as their lives—may be subjected to indiscriminate post hoc searches for impermissible motives. In addition, subordinates can use our policy, which was intended merely to shield employees from their employers' improper actions, as a sword; threatened substantive due process suits for damages all too readily may force employers to retain unsuitable employees. In short, our policy has the effect of frustrating local government employers in their attempts to remove unsatisfactory employees.

D.

In this case, McKinney's allegations state only a procedural—not a substantive—due process claim. Even if McKinney's allegations are taken to be true, the process due McKinney under *Loudermill* and *Parratt* was limited to an opportunity to present his case before the Board at a pre-termination hearing and the presence of adequate post-termination remedies. McKinney availed himself of the first opportunity. "The fact that [McKinney] failed to avail himself of the full procedures provided by state law [i.e., the post-termination remedies] does not constitute a sign of their inadequacy." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485, 102 S.Ct. 1883, 1899

(1982). Since the Florida courts possess the power to remedy any deficiency in the process by which McKinney was terminated, McKinney can not claim that he was deprived of procedural due process.[21]

V.

We are left with one final task: delimiting the effect of today's holding. The County urges that we apply our decision retroactively, that is, to this case and to all other cases currently pending in the courts. McKinney urges that we announce our decision prospectively, that is, only to cases brought after this date; in the alternative, McKinney asks that we apply our holding in a selectively prospective fashion, thus excepting McKinney from its scope.[22]

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[21] One might argue that the doctrine of *stare decisis* mandates that we continue to follow our precedent and reinstate the jury award, even though it is not consistent with the precedent set by the Supreme Court, until the Supreme Court addresses the issue. As *stare decisis* is a hallmark of our judicial system, this argument is not without appeal.

Stare decisis, however, "is not an inexorable command. . . . Indeed, when [a] Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overriding a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Casey*, 112 S.Ct. at 2808 (citations omitted).

Since we have determined that our precedent is incorrect, we must also determine what weight to give to that albeit errant precedent. It must be recalled that this is the first time this court sitting en banc has addressed this issue; thus, the implications of *stare decisis* are less weighty than if we were overturning a precedent established by the court en banc.

Since we find that granting a substantive due process cause of action to individuals in McKinney's position produces several disfavored consequences, we conclude that the pragmatic and prudential considerations supporting overruling outweigh the considerations that support the doctrine of *stare decisis*.

[22] For a more detailed examination of the three styles of application (retroactive, prospective, and selectively prospective), see

The Supreme Court has established a three factor test for determining whether to apply a newly announced non-criminal decision retroactively. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971). To avoid retroactive application of the new holding, the court looks to three factors: First, the decision must announce a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression the resolution of which was not clearly foreshadowed. Second, the application of the old rule in the instant case must not contravene the purpose and operation of the provision being interpreted. And, third, application of the new rule in the instant case must be inequitable. The *Chevron Oil* test has not been overruled, but its continued validity has been called into question.

The first reason for believing that *Chevron Oil* no longer governs retroactivity questions is that the Supreme Court, in *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), overruled the criminal law counterpart to *Chevron Oil*, *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). In *Griffith*, the Court held that a new rule for conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.

Twice since *Griffith*, the Court has addressed retroactivity in non-criminal cases. *See Harper v. Virginia Dep't of Taxation*, 113 S.Ct. 2510, 2516-18 (1993); *Beam*, 111 S.Ct. at 2448 (opinion of Souter, J.). The County argues that these two cases implicitly overrule *Chevron Oil*. Neither *Griffith* nor *Beam/Harper*, however, is applicable to the situation at hand. First, the *Griffith* Court's sole concern was criminal cases, a realm which is wholly distinct (as far as retroactivity is concerned)

James B. Beam Distilling Co. v. Georgia, 111 S.Ct. 2439, 2443-45 (1991) (opinion of Souter, J.).

from civil cases. Second, the *Beam* and *Harper* Courts addressed the retroactive application of a new rule that had been announced and applied in an earlier case, not in the instant case (as here). *Beam* and *Harper* stand only for the proposition that, once a rule of federal law is applied to the parties in the case in which it was announced, it must be applied retroactively. *See Harper*, 113 S.Ct. at 2517; *Beam*, 111 S.Ct. at 2446 (opinion of Souter, J.). Neither decision directly addresses whether a newly announced decision need be applied to the parties in the instant case. Thus, the *Beam* and *Harper* courts did not overrule *Chevron Oil*'s three factor test. In addition, both Justice Souter's opinion in *Beam* and Justice Thomas' opinion in *Harper* reveal that the "general rule" of retrospective effect is just that: a general presumption which is subject to rebuttal under a *Chevron Oil* analysis. As a result, the posture of this case is not comparable to *Beam* and *Harper*; we therefore look to *Chevron Oil* itself for our standard concerning retroactivity.

The first *Chevron Oil* factor clearly is satisfied: Our holding today is a new rule which overrules our precedent. In addition, if we accept McKinney's allegations as true, the third factor may also be satisfied: McKinney's opportunity to litigate his grievance will be diminished by our holding; applying the old rule thus avoids an alleged inequity to him.[23]

Regardless of the strength of these two factors, however, McKinney's argument fails on balance [24] because of

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[23] Refusing to apply the new rule retroactively, as McKinney desires, would also produce inequities—for defendants in other pending cases and all other state and local governmental bodies that have discharged employees and still may be subject to suit.

[24] The Supreme Court has not indicated whether the party seeking prospective-only application satisfies the *Chevron Oil* test only after meeting *all three* factors or, rather, after demonstrating that the factors supporting prospectivity outweigh those supporting

the second *Chevron Oil* factor: the purpose of the interpreted law. Today, we interpret the substantive component of the Due Process Clause. Our holding, consistent with Supreme Court precedent, is that the Clause does not provide a remedy in cases like McKinney's; rather, the Clause is designed to prompt state and local government to afford citizens due process in, among other situations, employment termination cases. Perpetuating the fiction that the Clause provides a remedy impedes this goal by encouraging claimants to bring premature suits in federal court, thereby circumventing established state procedures specifically designed to provide them with constitutionally required due process and removing all incentive for states to provide remedial procedures. Even though McKinney satisfies the first *Chevron Oil* factor and may satisfy the third, therefore, the fact that the Due Process Clause does not provide him with a source of relief mandates that we not create a fiction that it does. Our holding must be applied retroactively.

VI.

In this case, McKinney sought extraordinary relief: McKinney wanted the federal courts to engage in an after-the-fact examination of the motives of the individuals who terminated him. Ironically, even in death penalty cases,

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retroactivity. No panel of this court has conclusively decided the issue, either.

Both courts, however, have used language suggesting that a balancing approach is appropriate. For instance, in *Beam*, five justices signed on to opinions using balancing language; Justice O'Connor's dissent was strongest, stating that the second *Chevron Oil* factor must be "weigh[ed] in the balance" against the first and third factors. 111 S.Ct. at 2455. Similarly, a panel of this court has noted that the "three separate factors are to be *weighed* in deciding the nonretroactivity question." *Ackinclose v. Palm Beach Cty.*, 845 F.2d 931, 933 (11th Cir. 1988) (emphasis added).

Because McKinney's case fails under either standard, we do not today adopt either standard for *Chevron Oil* jurisprudence in this circuit.

where the anticipated deprivation of life is of significantly greater magnitude than the deprivation claimed by McKinney, we do not allow the convicted criminal to raise after-the-fact objections to the motives of the judge and jury that convicted him. In this case, McKinney could have availed himself of state court procedures that not only could have provided him with adequate relief, but also would have satisfied his interest in due process. McKinney chose not to utilize those procedures, however; we therefore hold that there was no due process violation and, as a result, no section 1983 claim. The district court's order of judgment notwithstanding the verdict is AFFIRMED.

IT IS SO ORDERED.

HATCHETT, Circuit Judge, Specially Concurring:

I join in the judgment holding that McKinney did not present a substantive due process claim according to Supreme Court precedent. I write specially to emphasize the fact that we are not holding that one who suffers a due process violation must first seek relief in state courts, or follow state administrative procedures before bringing a lawsuit in the federal courts. The Supreme Court rejected such a contention over twelve years ago in *Patsy v. Board of Regents,* 457 U.S. 496, 102 S. Ct. 2557, 73 L.Ed.2d 172 (1982).

EDMONDSON, Circuit Judge, concurring in judgment:

In its application, substantive due process is a puzzling concept. I agree that an allegation of injury resulting from a biased decision maker in a case like this one presents not a substantive due process claim, but a procedural due process claim. I also agree that McKinney is bound by this conclusion.

But today's court opinion speaks of many other things that seem unnecessary to deciding this case. Some of

these other things may be important. I would prefer to discuss them when doing so is essential to deciding a concrete case.

I concur in the judgment.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-3416

MILLARD MCKINNEY,
Plaintiff-Appellant,
v.

JOHN PATE, individually and in his official capacity as Commissioner of the Osceola County Board of Commissioners, JACK SHANNIN, individually and in his official capacity as Development Dept. Director of Osceola County, and the OSCEOLA COUNTY BOARD OF COMMISSIONERS, COLLECTIVELY,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(No. 89-836-CIV-ORL-19), L. Clure Morton,
Judge, Sitting by Designation

June 17, 1993

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

Before TJOFLAT, Chief Judge, FAY, KRAVTICH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK and CARNES, Circuit Judges.

BY THE COURT:

A member of this court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

APPENDIX C

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-3416

MILLARD MCKINNEY,
Plaintiff-Appellant,
v.

JOHN PATE, individually and in his official capacity as Commissioner of the Osceola County Board of Commissioners, JACK SHANNIN, individually and in his official capacity as Development Dept. Director of Osceola County, and the OSCEOLA COUNTY BOARD OF COMMISSIONERS, collectively,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

March 17, 1993

Before TJOFLAT, Chief Judge, and FAY and COX, Circuit Judges.

FAY, Circuit Judge:

Millard McKinney, the former Osceola County Building Official, appeals the district court's order setting aside the jury verdict in his favor because there was substantial

evidence to support his claim that the Osceola Board of County Commissioners [*hereinafter* "the Board"] violated his right to substantive due process by terminating him without cause. In opposition, the Board [1] asserts that the question of whether there is a violation of McKinney's rights under substantive due process is a question of law for the court. It further argues that if the court finds evidence to support a rational basis for the Board's decision to terminate Mr. McKinney, it must enter judgment in favor of the defendant Board, notwithstanding the jury's verdict. We find the district court erred in setting aside the verdict in favor of McKinney. Accordingly, the district court's order is VACATED and the judgment in favor of McKinney is reinstated.

I. Facts

Millard McKinney was hired as the Osceola County Building Official on July 27, 1987. The Building Official is the head of the Building Division, one of three divisions within the Osceola County Development Department. The parties agree that both the Building Division, and the Development Department as a whole, were the target of complaints from the public and that the Board had been investigating ways to improve the public's perception and the performance of these departments. McKinney testified that he was hired with a mandate to address some of the problems the Building Division had experienced, specifically laxity in enforcement of the building codes, and that he successfully brought about needed reforms and improvements.

In the spring of 1988, almost a year after McKinney was hired, at least two "workshops," or public hearings, were held to discuss on-going problems in the Develop-

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[1] McKinney voluntarily dismissed his action against the defendants John Pate and Jack Shannin in their individual capacity. Therefore, the Osceola Board of County Commissioners is the only defendant remaining in this appeal.

ment Department, including the Building Division. McKinney asserts that these problems were "the same as in any Building Division anywhere." *Appellant's Brief* at 5. The Board, in contrast, asserts that these workshops were held in response to complaints about McKinney and constitute evidence of his poor performance. The undisputed evidence is that, whatever the source of the problems leading to the public hearings, McKinney's performance reviews before and after these hearings were uniformly excellent. Undisputed also is that the Osceola County Policy Manual in effect at the time, and applicable to McKinney, provided that permanent employees such as McKinney could only be terminated for cause and in accordance with the procedures established therein.

Mr. McKinney's direct supervisor was Jack Shannin. Shannin, in turn, reported to Eleanor Anderson, the County Administrator, who reported directly to the Board of County Commissioners. In November of 1988, three new members were elected to that Board. Jack Pate was one of these new commissioners. Shortly after the election, Anderson testified that the new Board met to discuss needed changes in the Building Division, although at trial the Board members denied that any such meeting took place. The upshot of the alleged meeting, as Anderson testified she understood it, was that McKinney was to be terminated. She in turn instructed Jack Shannin, her subordinate, to fire McKinney. Shannin testified that he twice asked for McKinney's resignation in compliance with Anderson's instructions. It is undisputed that the formal requirements or procedures of the policy manual were not followed in connection with this request. Indeed, McKinney testified that he was not given any reason for his requested resignation other than that the commissioners wanted it.[2] When McKinney protested that Shannin

[2] The county's employment policy required written notice and an opportunity to improve before a permanent employee could be fired.

had no reason to fire him, McKinney testified, that Shannin replied, "I don't have anything. But I'll get something." R3-55-132.

In January of 1989, Shannin and Anderson met with McKinney and gave him a list of the reasons for his proposed termination. Immediately thereafter, on three non-consecutive days, hearings regarding these charges were held before the Board itself, instead of the Personnel Committee as provided for by the county's policies. McKinney presented evidence to refute the charges and challenged the validity of some of the testimony as being unverified or motivated by personal animus. Nevertheless, on February 1, 1989 the Board entered a finding that McKinney's termination was justified on the basis of the evidence it heard.[3] McKinney was terminated and this suit ensued.

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[3] The Board specifically noted that its decision to terminate McKinney was *not* based on the alleged conflict of interest arising from McKinney having had employees under his supervision inspect the construction of his private residence. Now the Board claims that this fact was crucial to its decision. At trial the commissioners testified that this "conflict" was a significant factor in their decision, despite their assertion at the time that the issue of McKinney's house was not the reason for their decision. The district court also apparently found this "conflict" very significant. R1-47-4. We are not so impressed with the gravity of this charge. Indeed, the inordinate emphasis placed on this "conflict" tends to support McKinney's case rather than that of the Board.

First, the advisory opinions from the Florida Commission on Ethics clearly illustrate that the Florida statute, § 112.313(7)(a), which the Board claims prohibits McKinney from having his home inspected by members of his own department, is directed at public officials who have *business* interests which conflict with their public duties. *See* R1-39, Attachments, Op. 81-20 (dated April 2, 1981) & Op. 81-51 (dated September 17, 1981). Thus, it is debatable whether the statute was meant to apply in the construction of a private residence because any interest McKinney may have in cutting costs by skirting the code would seem to be offset by the fact that he bears the risk of loss or injury if the building fails to meet code specifications. Second, it is undisputed that the

The crux of McKinney's argument is that the reasons given for his termination were pretextual, and that the hearing was held in an attempt to disguise the Board's illegitimate motives with an appearance of regularity. McKinney suggests those motives were that some Board members, in particular Mr. Pate, were unhappy with him because he was enforcing the code as required. McKinney claims that Pate had ties to contractors who were unhappy because they wanted special treatment, waivers and exemptions to which they were not entitled.

There is substantial evidence to support this claim. Mr. Pate was formerly employed in the Building Division. Prior to McKinney's arrival, Pate had been rejected for the position ultimately awarded to McKinney. Pate was also employed by a dry wall subcontractor whose work, in the normal course of business, was inspected by McKinney's department.[4] Most significantly, both before and after his election to the Board, Pate approached McKinney regarding projects with code violations, although the nature and extent of his intervention is in dispute.[5] Despite the substantial evidence in support of McKinney's claim

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division had no specific policy to deal with such conflicts. Third, there is substantial evidence that numerous similar, if not more egregious, conflicts arose with other members of the department and the commission and did not occasion comment, let alone dismissal, of those individuals.

[4] This is only one of the many apparent or potential conflicts of interest, revealed by the evidence, that apparently have not occasioned any comment or censure.

[5] McKinney testified that Pate approached him on behalf of the contractors involved in various jobs in an attempt to get McKinney to waive or overlook code violations. Pate's testimony on this point is conflicting. Initially, he acknowledged approaching McKinney regarding some of these jobs and acting on behalf of the contractors involved. Later he denied that he acted on their behalf, or that he was attempting to get McKinney to use his discretion in their behalf, but he did not offer any concrete alternative explanation for his actions regarding these projects.

and the jury verdict in his favor, the district court granted the Board's motion for a judgment notwithstanding the verdict.[6]

II. Standard of Review

Motions for judgments notwithstanding the verdict are subject to *de novo* review. *Hessen v. Jaguar Cars, Inc.*, 915 F.2d 641, 644 (11th Cir.1990). The reviewing court therefore applies the same standard in such cases as the district court is required to apply. *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir.1989).

> [W]e consider all the evidence, and the inferences drawn therefrom, in the light most favorable to the nonmoving party. If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion was properly granted. Conversely, if there is substantial evidence opposed to the motion such that reasonable people, in the exercise of impartial judgment, might reach differing conclusions, then such a motion was due to be denied and the case was properly submitted to the jury.

Id. at 581 (citations omitted). Under this standard "there must be a substantial conflict in the evidence to support a jury question." *Id.* at 581.

The evidence in this case reflected such a conflict. Indeed, even though the balance of the evidence probably favored McKinney, the conflict in the evidence was sufficient to deny McKinney a directed verdict, had he asked for it. Accordingly, a judgment notwithstanding the verdict in favor of the Board was inappropriate where the

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[6] The district court's order is rather general and conclusory. Therefore, the basis for its conclusion that the "conflicting evidence" compelled a judgment in the Board's favor is unclear. In the absence of other grounds, we assume the court relied on the arguments of the Board's counsel and that its reasoning corresponds to that advanced by the Board.

jury had resolved the disputed factual issues in McKinney's favor. The Board attempts to avoid this result by arguing that the issue of whether McKinney's rights of substantive due process were violated is to be decided by the judge, and further, that the existence of *any* evidence to support its termination of McKinney compels the court to rule in its favor. This argument, as will be demonstrated below, is not supported by the law.

III. Substantive Due Process

McKinney asserts that, pursuant to county policy, he could only be discharged for cause, and that instead his discharge was founded on illegitimate motives. This action he claims deprived him of a protected property interest in his job without substantive due process.[7] It is well settled that such claims state "a substantive due process violation—deprivation of a property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational basis." *Hearn v. City of Gainsville,* 688 F.2d 1328, 1332 (11th Cir.1982). *See also Adams v. Sewell,* 946 F.2d 757, 766 (11th Cir.1991); *Barnett v. Housing Authority of Atlanta,* 707 F.2d 1571, 1577 (11th Cir.1983). The distinguishing feature of such claims, in contrast to procedural due process claims, is "that certain governmental conduct would remain unjustified even if it were accompanied by the most stringent of procedural safeguards." *Gilmere v. City of Atlanta,* 774 F.2d 1495, 1500 (11th Cir. 1985) (*en banc*), *cert. denied,* 476 U.S. 1115, 106 S.Ct. 1970, 90 L.Ed.2d 654 (1986).

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[7] The issue of whether an employee has a protected property interest in his job is a matter of state law. *Barnett v. Housing Authority of Atlanta,* 707 F.2d 1571, 1576 (11th Cir.1983). Florida courts have held public employees have such an interest when they have a right to be discharged only for cause. *See, e.g., West v. Board of County Comm'r.,* 373 So.2d 83, 85-86 (Fla. 3rd DCA 1979).

For its argument that this case did not present a jury question, the Board relied on *Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1578 n. 15 (11th Cir.1989), *reh'g denied, en banc,* 893 F.2d 346 (1989). *Greenbriar* was a zoning case where the plaintiffs argued that a zoning regulation deprived them of substantive due process.

In *Greenbriar* we noted that the enactments of legislative or quasi-legislative bodies, such as a zoning board, " 'are entitled to a presumption of validity.' " *Id.* at 1577 n. 14 (*citing Couf v. DeBlaker,* 652 F.2d 585, 588 (5th Cir. Unit B 1981), *cert. denied,* 455 U.S. 921, 102 S.Ct. 1278, 71 L.Ed.2d 462 (1982)). In that context, we held that the "ultimate issue of whether a zoning decision is arbitrary and capricious is a question of law to be determined by the court." *Id.* at 1578.

The Board argues, pursuant to *Greenbriar,* all substantive due process questions are to be submitted to the judge and, further, it appears to rely on the presumption of validity discussed in *Greenbriar* to argue that if there is *any* evidence to support its position that McKinney's firing was not arbitrary and capricious, then it is entitled to judgment in the Board's favor. The Board misperceives the nature of the rule and the discussion in the *Greenbriar* case.

It is one thing to presume that a rule or statute of general applicability is not arbitrary and capricious. It is quite another to make such a presumption where the government action disproportionately affects one person. This is not to say that whenever an official government entity discharges an employee that it may not be acting in the public interest. Theoretically, all of the government's actions are in the public interest. However, actions that are of general applicability, on their face, raise fewer concerns about improper motives than actions directed at one person. Presumably, the very purpose of the "for cause" provision in the County Policy Manual is to insulate non-elected, public employees from illegiti-

mate political pressure and retaliation, in recognition of the fact that hiring and firing decisions potentially raise troubling questions of motive in ways that ordinary rule-making and legislation do not.

In addition, by their nature, zoning regulations or laws must be analyzed in part on the basis of their wording, a task for which the judge is particularly suited as this is the familiar exercise of statutory interpretation. Regulations may or may not be facially neutral. Moreover, collateral facts, found by a jury, may indicate that a facially impartial regulation is not impartial in fact. In contrast, the act of terminating an employee for illegitimate reasons has already been deemed a violation of substantive due process. *See, e.g., Adams v. Sewell*, 946 F.2d at 766. The only thing left to be determined is whether, in a particular case, the facts support such a conclusion. This purely factual inquiry is the province of the jury.

The jury here had to answer two questions.[8] The first was whether there was substantial evidence to support the Board's proffered grounds for discharging Mr. McKinney.[9] The jury answered this question in the negative. The second question was whether the jury believed McKinney's claim that his firing was founded on illegitimate motives.[10] It answered this question in the affirmative and

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[8] Although the Board objected to the jury interrogatories at trial, they have not cross-appealed this issue so it is waived.

[9] The question read: "Was there substantial evidence that the plaintiff was fired because of incompetent or inefficient performance of the duties of the office?" R1-41-1.

[10] The question read: "Was the plaintiff fired because of political or personal animosity because of plaintiff's enforcement of the building codes?" R1-41-1-2.

This question requires some clarification. The gravamen of McKinney's complaint is that he was fired because certain commissioners wanted to continue a practice of lax enforcement of the building codes as an improper concession to commercial developers and contractors. He characterizes this as a "political" motive. Here

awarded McKinney $145,000.00 on his claim. While there were certainly disputed points, the evidence was clearly such that reasonable people could reach different conclusions as to what had occurred. Where the evidence is such that reasonable people could differ, the issue is appropriately resolved by a jury and the judge is not free to substitute his or her opinion for that of the jury. Thus, the district court's ruling setting aside McKinney's judgment was clearly erroneous and is vacated.[11]

IV. Accrual of Interest

Although the district court's order setting aside the jury verdict indicated that a judgment for the Board, consistent with its order, would be forthcoming, no such judgment was ever entered. Thus, the only judgment in this case was entered in favor of McKinney on March 21, 1991. With the reversal of the court's order setting that verdict aside, the judgment for McKinney is automatically reinstated as of the date of entry. Therefore, interest should accrue from the date of the original judgment.

"political" must be read with the qualifier "improper," because "political" cannot mean "improper" in all cases. Sometimes the "just cause" for a dismissal may have its roots in the political. For example, a public employee who is so unpopular that he is ineffective is in danger of termination for cause. Ultimately, however, the "cause" is his ineffectiveness, not his unpopularity. In this case, although the Board attempted to argue that McKinney was ineffective, and therefore dismissed with cause, the jury found the weight of the evidence did not support the Board's position. This question might have been more clearly worded to emphasize that "political" did not invariably mean "improper," although that was its meaning in the context of this case.

[11] The Board argues that this case should be remanded for a new trial should we find the district court's order was erroneous. However, although the Board argued this in its original motion for a judgment notwithstanding the verdict, it did not cross-appeal the issue. The failure to cross-appeal renders this point waived and without merit.

V. Conclusion

For the foregoing reasons we vacate the district court's order setting aside the jury verdict. As the judgment in favor of McKinney has already been entered that judgment is hereby reinstated and the matter is remanded to the district court for entry of the appropriate orders.

VACATED and REMANDED.

TJOFLAT, Chief Judge, specially concurring in which COX, Circuit Judge, joins:

Because we are bound by circuit precedent,[1] I concur in the judgment of the court. I write separately to express my increasing concern regarding the divergence of this circuit's substantive due process jurisprudence from that of the Supreme Court.[2]

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[1] Per *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), a prior panel's holdings can only be overruled by the court sitting *en banc*.

[2] I do not dispute the unfortunate endurance of substantive due process. It has outlasted many, though not all, of its critics. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 392-93, 91 S.Ct. 780, 793-94, 28 L.Ed.2d 113 (1971) (Black, J., dissenting) ("With a 'shock the conscience' test of Constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test wilfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief, or his politics."); *Lochner v. New York*, 198 U.S. 45, 75-76, 25 S.Ct. 539, 547, 49 L.Ed. 937 (1905) (Holmes, J., dissenting) ("[T]he accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."). Others have found themselves, however reluctantly, persuaded that substantive due process is here to stay. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 544, 97 S.Ct. 1932, 1959, 52 L.Ed.2d 531 (1977) (White, J., dissenting) ("[T]he Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its

This case illustrates our fundamental failure to distinguish between procedural and substantive due process. While the Supreme Court has used substantive due process as a means of recognizing fundamental rights "implicit in the concept of ordered liberty," the Eleventh Circuit has strayed from this narrow path and created for state or local employees a "substantive" right not to be terminated for pretextual reasons even where state procedures exist which would correct the injustice and make them whole.

I will first survey the circuit law on pretextual termination, then examine the due process jurisprudence of the Supreme Court. Concluding that circuit doctrine no longer complies with High Court precedent, I will suggest that these pretextual termination cases implicate only procedural guarantees.

I.

The Eleventh Circuit has considered a number of "substantive" due process employment termination cases in the last ten years.[3] The first clear indication that we would

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welfare. Whenever the Judiciary does so, it unavoidably preempts for itself another part of the governance of the country without express constitutional authority."); *Whitney v. California*, 274 U.S. 357, 373, 47 S.Ct. 641, 647, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring) ("Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the states.").

[3] We have resolved other, similar, cases through procedural reasoning, asking whether the employee had a state-created entitlement to the job, and if so, whether the state had provided constitutionally adequate procedures before termination. *See, e.g., Lee v. Hutson*, 810 F.2d 1030, 1032-33 (11th Cir.1987) (finding that allegations of numerous procedural defects did not make out a substantive due process claim).

In teacher termination cases involving allegations of violations of both procedural and substantive due process, we have inquired

recognize a substantive due process violation for the pretextual termination of a state employee came in *Hearn v. City of Gainesville*, 688 F.2d 1328 (11th Cir.1983). The *Hearn* panel found that the Due Process Clause was implicated when the head of the city's personnel department arranged the elimination of the plaintiff's position in order to terminate him without cause:

> [T]he layoff was a phony arrangement, carried out for an improper motive, to deprive Hearn of his job. This states a substantive due process violation—deprivation of a property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and, because unrelated to the proper reasons for layoff, without any rational basis.

Id. at 1332 (citing *Nebbia v. New York*, 291 U.S. 502, 525, 54 S.Ct. 505, 510, 78 L.Ed. 940 (1933) ("the guaranty of due process . . . demands . . . that the law shall not be unreasonable, arbitrary or capricious")).

A second panel visited the issue some six months later in *Barnett v. Housing Authority of Atlanta*, 707 F.2d 1571 (11th Cir.1983). The plaintiff asserted that his termination was an attempt "to make him a sort of scapegoat" in response to an incident which embarrassed the

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"whether the procedures followed by the school authorities comported with due process requirements, and, if so, whether the action taken is supported by substantial evidence." *Holley v. Seminole County Sch. Dist.*, 755 F.2d 1492, 1496 (11th Cir.1985) (quoting *Viverette v. Lurleen B. Wallace State Junior College*, 587 F.2d 191, 193 (5th Cir.1979)); *cf. Hatcher v. Board of Pub. Educ.*, 809 F.2d 1546, 1552 (11th Cir.1987). The first prong of this test involves constitutional assessment of the procedures used to effect the termination. The second prong, a "limited substantive review," assures that there is "substantial evidence" for the decision, thus, "a rational basis for the deprivation of an individual's property." *Holley*, 755 F.2d at 1499. This is an appropriate, essentially procedural, review of the sufficiency of the evidence. It is unfortunate, however, that we have invited litigants to allege violations of *substantive* due process in order to trigger this analysis.

Board of Commissioners of the Atlanta Housing Authority. The court affirmed the judgment entered on the jury verdict in the plaintiff's favor, finding the pretextual nature of the firing to be a violation of the plaintiff's substantive due process rights. *Id.* at 1577-78.

The rule was applied most recently in *Adams v. Sewell*, 946 F.2d 757 (11th Cir. 1991). In that case, the panel found a substantive due process violation where a county alleged "improper management techniques" as the basis for discharge rather than admit that the employee was being fired because of allegations that he had sexually harassed another employee. *Id.* at 766-67.

The Eleventh Circuit law of "substantive" due process in the government employment setting is clear, albeit misguided. "A violation of a public employee's right to substantive due process occurs when an employer deprives the employee of a property interest for an improper motive and by means that [are] pretextual, arbitrary and capricious, regardless of whether or not a hearing was held." *Nolin v. Douglas County*, 903 F.2d 1546, 1553-54 (11th Cir. 1990) (internal quotation marks omitted); *see Barnett*, 707 F.2d at 1577; *Hearn*, 688 F.2d at 1332; *see also Adams*, 946 F.2d at 766; *Kelly v. Smith*, 764 F.2d 1412, 1413 (11th Cir.1985). The plaintiff must show (1) a deprivation of a state law property right in continued employment (2) made through pretextual means to disguise an improper motive.

Satisfaction of these requirements will not make out a substantive due process claim under the jurisprudence of the Supreme Court, however. Only *procedural* issues are implicated. Whether an individual complains that a state lacks constitutionally adequate procedures for termination of employees or asserts that his particular hearing was not fair and impartial, he has raised only procedural due process concerns.

II.

The Due Process Clause of the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Notwithstanding the oxymoronic consequence,[4] it is well-settled that the clause has both procedural and substantive content. *See Planned Parenthood v. Casey*, —— U.S. ——, ——, 112 S.Ct. 2791, 2804, 120 L.Ed.2d 674 (1992) ("Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years . . . the Clause has been understood to contain a substantive component as well. . . ."); *see also Daniels v. Williams*, 474 U.S. 327, 337, 106 S.Ct. 662, 677, 88 L.Ed.2d 662 (1986) (Stevens, J., concurring in the judgment) (noting that "the Due Process Clause of the Fourteenth Amendment . . . is the source of three different kinds of constitutional protection": procedural due process, substantive due process, and incorporation); *Burch v. Apalachee Community Mental Health Servs., Inc.*, 840 F.2d 797, 800 (11th Cir.1988) (same), *aff'd sub nom. Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). The Due Process Clause guarantees that a state may not effect a deprivation of life, liberty, or property without certain procedural safeguards. While this guarantee of *procedural* due process is the core meaning of the clause, the Court has endorsed two *substantive* interpretations of the clause as well. The first substantive interpretation is that the clause selectively incorporates provisions of the Bill of Rights, and protects these rights against infringe-

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[4] As John Hart Ely noted:

> [T]here is simply no avoiding the fact that the word that follows "due" is "process." . . . Familiarity breeds inattention, and we apparently need periodic reminding that "substantive due process" is a contradiction in terms—sort of like "green pastel redness."

Democracy and Distrust: A Theory of Judicial Review 18 (1980).

ment by state and local governments.[5] The second substantive interpretation is that the clause bars "certain

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[5] One might also view incorporation as a special case of substantive due process protection of fundamental rights. Justice Cardozo's famous opinion in *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), recognized certain rights as "implicit in the concept of ordered liberty," and thus protected by the Fourteenth Amendment against state infringement. *Id.* at 325-26, 58 S.Ct. at 152. The selective incorporation of most of the Bill of Rights has been a progressive recognition of those liberties as fundamental. *See, e.g., id.* at 323-26, 58 S.Ct. at 151-53 (recognizing the incorporation of free exercise of religion, freedom of speech, freedom of press, freedom of assembly, right to petition the government, Fifth Amendment due process, right to compensation for takings, and Sixth Amendment charge and subpoena rights); *Everson v. Board of Educ.*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947) (incorporating the establishment clause); *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948) (incorporating the right to a public trial); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (incorporating the Fourth Amendment); *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (incorporating the Eighth Amendment prohibition on cruel and unusual punishment); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (incorporating the Sixth Amendment right to counsel); *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) (incorporating the Fifth Amendment right against self-incrimination); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (incorporating the Sixth Amendment confrontation clause); *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966) (incorporating the right to an impartial jury); *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967) (incorporating the right to a speedy trial); *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (incorporating the right to compulsory process for obtaining witnesses); *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (incorporating the right to a jury trial in a criminal case); *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) (incorporating the Fifth Amendment prohibition of double jeopardy); *Schilb v. Kuebel*, 404 U.S. 357, 92 S.Ct. 479, 30 L.Ed.2d 502 (1971) (incorporating the Eighth Amendment prohibition on excessive bail). The Second, Third, and Seventh Amendments remain unincorporated, as does the Fifth Amendment provision requiring grand jury indictments in criminal cases.

government actions regardless of the fairness of the procedures used to implement them." *Daniels*, 474 U.S. at 331, 106 S.Ct. at 665.

A.

This last guarantee, that of *substantive* due process, "prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952), and *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937)).[6] When the Su-

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[6] A reading of Justice Frankfurter's opinion for the Court in *Rochin* makes clear that this was to be one standard, not two:

> Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" or are "implicit in the concept of ordered liberty." . . . .
>
> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

342 U.S. at 169, 172, 72 S.Ct. at 208, 209-10 (citations omitted); *cf. Baker v. McCollan*, 443 U.S. 137, 147, 99 S.Ct. 2689, 2696, 61 L.Ed.2d 433 (1979) (Blackmun, J., specially concurring). The *Rochin* Court found the conduct of the police shocking *because* they violated the fundamental rights of the accused described in the Fourth Amendment.

[Continued]

preme Court invokes substantive due process, it does so to protect a "fundamental interest" or otherwise to preclude the abusive exercise of government power.

Thus, in its most recent examination of substantive due process, the Court considered the case of a city employee who died of asphyxia after entering a manhole to unstop a sewer line. *Collins v. City of Harker Heights* —— U.S. ——, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). His widow alleged that the city had violated her husband's substantive due process right to life by sending him into the manhole. Justice Stevens, writing for a unanimous Court, observed that

> Fairly analyzed, her claim advances two theories: that the Federal Constitution imposes a duty on the city to provide its employees with minimal levels of safety and security in the workplace, or that the city's "deliberate indifference" to Collins' safety was arbitrary Government action that must "shock the conscience" of federal judges.

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[6] [Continued]

Those rights, however, were as yet unprotected by the Constitution against state infringement. As I have previously noted:

> *Rochin* was decided in 1952, nine years before the Supreme Court decided that the fourth amendment was incorporated through the fourteenth amendment so as to apply to the states. *See Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The result in *Rochin* was the same result that would have been reached had the fourth amendment been applied.

Burch, 840 F.2d at 816 n. 10 (Tjoflat, J., dissenting).

Rochin did not purport to establish a "shocked conscience" standard of substantive due process, though Justice Black expressed a prescient concern that due process jurisprudence had been cut loose from anything other than the subjective beliefs of federal judges. *See Rochin*, 342 U.S. at 175-77, 72 S.Ct. at 211-12 (Black, J., concurring). The fact that a federal judge finds his personal scruples unsettled may be good cause to reflect more deeply on the rights implicated by the government action, but it should never be a surrogate for a reasoned consideration of whether a constitutional violation has occurred.

Id. at ——, 112 S.Ct. at 1069. The Court rejected both claims, terming the proposed constitutional right "unprecedented" and declining to find the action "arbitrary, or conscience-shocking, in a constitutional sense." *Id.* at ——, 112 S.Ct. at 1069-70.

The issue implicated by the instant case is the extent to which substantive due process, as opposed to procedural due process, serves to protect state-created contract rights, particularly employment rights. Though the Supreme Court has not decided this precise issue, in *Harker Heights*, Justice Stevens reminded us:

> [T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Id. at ——, 112 S.Ct. at 1068 (citation omitted).[7]

The Supreme Court has been unwilling to use substantive due process to "constitutionalize" traditional areas of

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[7] As Justice White wrote for an earlier Court:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us [to commit sodomy] today falls far short of overcoming this resistance.

Bowers v. Hardwick, 478 U.S. 186, 194-95, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986).

state law. Again, just last term the Court reiterated this point:

> Because the Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society," we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law. The reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship.

Id. at ——, 112 S.Ct. at 1070 (quoting *Daniels*, citations omitted); *see also Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 229, 106 S.Ct. 507, 515, 88 L.Ed.2d 523 (1985) (Powell, J., concurring) ("While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution.").

Thus, when the High Court has applied the doctrine of substantive due process, it has done so only to protect those rights that have been held to be fundamental to our democratic society. Substantive due process is not invoked to protect less elemental interests. The present case does not implicate these sorts of rights. The High Court's doctrine of substantive due process is not applicable.

B.

Under the Supreme Court's due process jurisprudence, this case implicates only the procedural guarantees of the Fourteenth Amendment. When the Supreme Court has considered due process claims in the context of the termination of state employees, it has generally analyzed them as *procedural* due process cases. Once an employee has

established an entitlement to continued employment under state law, the Court has been willing to invoke procedural guarantees from the Fourteenth Amendment. The companion cases of *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), first articulated the contours of due process protection for government employees.

Roth was an assistant professor hired by a Wisconsin state university under a single one year contract. He claimed that his procedural and substantive due process rights had been violated when the university did not offer him a second contract. The Court disagreed. The Court recognized that the liberty guaranteed by the Due Process clause was broad—"generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men"—but declined to find a liberty interest in being rehired after the expiration of a contract. *Roth*, 408 U.S. at 571-73, 92 S.Ct. at 2706-07. The Court also declined to find that Roth had a protectable property interest in being rehired: "Property interests, of course, are not created by the Constitution. Rather they are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Id.* at 577, 92 S.Ct. at 2709. Since neither state law nor the terms of the contract gave Roth a property interest in being rehired, he was not entitled to procedural due process protections.

In *Perry v. Sindermann*, however, the Court refused to affirm a summary judgment in favor of a University's Board of Regents in a similar factual setting. The dispositive difference was that Sindermann, unlike Roth, was able to point to various documents and practices which might support his claim that there was an implied contract granting him tenure under state law. *Sindermann*, 408 U.S. at 599-603, 92 S.Ct. at 2698-2700. The Court concluded that proof of such a property interest would

entitle Sindermann to a postdeprivation hearing. *Id.* at 603, 92 S.Ct. at 2700.

Neither *Roth* nor *Sindermann* derived a constitutionally protectable interest from the Fourteenth Amendment. Instead, the Court looked to "independent source[s] such as state law" to establish an interest protected under *procedural* due process. *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709; *cf. Sindermann*, 408 U.S. at 601-02, 92 S.Ct. at 2769-70.

The Court considered similar facts four years later in *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). There, a police officer terminated without a hearing claimed that he had been deprived of both property (his employment status) and liberty interests (freedom from public stigma, freedom from pretextual termination). The Court first examined state law to conclude that the policeman had no property interest protected under the Fourteenth Amendment. *Id.* at 344-47, 96 S.Ct. at 2077-79. The Court then turned to the policeman's asserted liberty interest and reasoned that the right to be free from public stigma could not arise where the reasons for termination were not made public. *Id.* at 348-49, 96 S.Ct. at 2079. Finally, the Court was unsympathetic to the claim that the termination was pretextual:

> The truth or falsity of the City Manager's statement determines whether or not his decision to discharge the petitioner was correct or prudent, but neither enhances nor diminishes petitioner's claim that his constitutionally protected interest in liberty has been impaired.

Id. at 349, 96 S.Ct. at 2079-80. The Court went on to suggest that

> *Indeed, the impact on petitioner's constitutionally protected interest in liberty is no greater even if we assume that the City Manager deliberately lied.*

> Such fact might conceivably provide the basis for a state-law claim, the validity of which would be entirely unaffected by our analysis of the federal constitutional question.

Id. at 349 n. 13, 96 S.Ct. at 2080 n. 13 (emphasis added). The Court concluded by rejecting the idea that the Fourteenth Amendment provides for the substantive review of state employment decisions:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Id. at 349-50, 96 S.Ct. at 2080 (footnote omitted).[8]

More recently, the Supreme Court considered two consolidated cases in which the terminated employees had been " 'classified civil service employees,' entitled to retain their positions 'during good behavior and efficient service,' who could not be dismissed 'except . . . for . . .

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[8] Of course, as the Court notes, the state may not interfere with the "incorporated" liberties of its employees. *See, e.g., Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (freedom of expression); *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion) (freedom of political association); *Sindermann*, 408 U.S. at 597-98, 92 S.Ct. at 2698 (freedom of speech).

misfeasance, malfeasance, or nonfeasance in office.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985) (quoting Ohio Rev.Code Ann. §§ 124.11 & 124.34 (1984)). The Court concluded that the employees "had a property right in continued employment," and were thus entitled to the protections of procedural due process. *Id.* at 538, 541, 105 S.Ct. at 1491, 1493.

In the case before us, state law granted McKinney a similar protectable property interest in his job. The jurisprudence of the High Court suggests that McKinney thus had a property right which was fully protected by the requirements of *procedural* due process. *See Loudermill*, 470 U.S. at 541, 105 S.Ct. at 1493.[9] The Constitution guards McKinney's property right in his job, not against termination as such, but against termination *without due process of law*. This is a procedural guarantee, not a substantive one.

In sum, the Supreme Court employs procedural due process to provide protection for employment entitlements

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[9] Nor can a state restrict substantive rights through procedural definition:

> The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

Loudermill, 470 U.S. at 541, 105 S.Ct. at 1493 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167, 94 S.Ct. 1633, 1650, 40 L.Ed.2d 15 (1974) (Powell, J., concurring in part and concurring in the result in part)).

created by state law, and reserves substantive due process to protect those property or liberty interests that are incorporaed by the Fourteenth Amendment or otherwise recognized as "fundamental" to our democratic society.

III.

The difference between substantive and procedural due process is not just semantic. Had the Board of County Commissioners deprived McKinney of some substantive due process claim, he would have a federal cause of action. As it is, he can only allege that he was subjected to an unfair proceeding, and since he did not pursue the available state-provided remedies (and he does not allege that these remedies were inadequate), he has suffered no constitutional deprivation. For this reason, he fails to state a claim under 42 U.S.C. § 1983 (1988).

McKinney alleged a violation of section 1983, which provides

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

Thus, McKinney must establish two elements: (1) that the conduct complained of was committed under color of state law, and (2) that the conduct deprived the plaintiff of federal constitutional or statutory rights. *Parratt v. Taylor,* 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981), *overruled on other grounds by Daniels v. Williams,* 474 U.S. 327, 330-31, 106 S.Ct. 662, 664, 88 L.Ed.2d 662 (1986). McKinney claimed that the Board, acting under color of state law, violated his constitutional right to "substantive" due process, by

failing to provide him with a fair hearing before an unbiased decisionmaker.[10]

Notwithstanding our decisions in *Hearn*, *Barnett*, and *Adams*, his allegations go to procedural concerns, not substantive ones.[11] By alleging that the Osceola Board of County Commissioners terminated him for illegitimate reasons, McKinney stated a claim that he was denied procedural due process. When his claim is thus recast, it is clear that he has brought it in the wrong court.

In reviewing an alleged denial of procedural due process, we must ask "What procedure was due, but not received?" McKinney argues that he was entitled to a fair tribunal. So he was. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). Indeed, state law provided him with a means of vindicating that right through review by a civil service board or state circuit court. Florida provided a means

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[10] The Complaint alleged:

> Although the BOARD was supposed to act in the capacity of an impartial decision-making body, nevertheless that was impossible and did not in fact occur because:
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> (a) at all times the majority of the BOARD knew that the reasons for MCKINNEY's proposed termination were false, pretextual and politically motivated and did not constitute proper cause for his discharge;
>
> (b) the majority of the BOARD were at all times aware of PATE's activities to secure MCKINNEY's discharge for political reasons unconnected with proper reasons for discharge, and had decided to acquiesce in PATE's desires; and
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> (c) the majority of the BOARD had decided in advance of the hearing to "rubber stamp" the recommendation for termination regardless of the evidence introduced at the hearing itself.

Record, vol. 1, no. 1 at 7.

[11] One can hardly blame the litigant for being misled by our prior pronouncements in pretextual termination cases, but the incorrect label should not deter us from the proper analysis.

of review for procedural irregularities by the Board of County Commissioners. *Cf., e.g., Elder v. Highlands County Bd. of County Comm'rs,* 497 So.2d 1334 (Fla. Dist.Ct.App.1986); *Seminole County Bd. of County Comm'rs v. Long,* 422 So.2d 938 (Fla.Dist.Ct.App.1982); *West v. Board of County Comm'rs, Monroe County,* 373 So.2d 83 (Fla.Dist.Ct.App.1979). McKinney did not claim that his state remedies were inadequate.

Although "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983," a violation of federal *procedural* due process is not complete

> when the deprivation occurs; it is not complete unless and until the State fails to provide [procedural] due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

Zinermon v. Burch, 494 U.S. 113, 123, 125, 110 S.Ct. 975, 982, 983, 108 L.Ed.2d 100 (1990). Where an adequate state law remedy is provided to vindicate federal due process rights, there can be no denial of procedural due process, and thus no constitutional violation.

Assuming McKinney's allegations to be true, he is the victim of an illegal kangaroo court. Since such a proceeding was admittedly random and unauthorized, and since the state provided him with an adequate remedy,[12] McKinney has no federal claim. *See Parratt,* 451 U.S. at 542, 101 S.Ct. at 1916 ("[T]he existence of an adequate state remedy to redress property damage inflicted

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[12] He does not claim that the prescribed procedures were unfair.

by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment." (quoting *Bonner v. Coughlin,* 517 F.2d 1311, 1319 (7th Cir. 1975))). As the High Court has observed, "The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." *Hudson v. Palmer,* 468 U.S. 517, 533, 104 S.Ct. 3194, 3203, 82 L.Ed.2d 393 (1984).

I conclude that McKinney has failed to state a claim for relief under 42 U.S.C. § 1983. His remedy is in state, not federal, court.

IV.

Were it not for *Hearn* and its progeny, I would direct the district court to dismiss McKinney's claim. Nevertheless, the wayward jurisprudence of our circuit is a clear, though errant, guide. We must follow it until we review the issue *en banc*.

APPENDIX D

[Filed Apr. 8, 1991]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 89-836-CIV-ORL-19

MILLARD MCKINNEY

vs.

JOHN PATE, individually, and in his official capacity as Commissioner of the Osceola County Board of County Commissioner, Osceola County, Florida; JACK SHANNIN, individually and in his official capacity as Development Department Director of Osceola County, Florida; and the OSCEOLA COUNTY BOARD OF COUNTY COMMISSIONERS, collectively as the governing body of Osceola County, Florida

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MEMORANDUM

In this case the jury returned a verdict in the amount of $145,000.00 in favor of the plaintiff. The court announced in open court that it would set the verdict aside on the filing of a motion for judgment N.O.V. Thereupon the plaintiff entered a motion on the record, and the court accepted it as such.

Plaintiff, Millard McKinney, was employed as a Building Official in a subordinate position to the Osceola County Board of County Commissioners. The chain of command was as follows in inverse order:

Osceola County Board of County Commissioners (5 in number)

County Administrator

Director of the Development Department

Building Official

He began his employment on July 27, 1987. He was terminated January 26, 1989. During his employment he received better than satisfactory evaluations from his immediate supervisor and received a salary increase.

As a result of an election in the fall of 1988, three commissioners were replaced. One of the three newly elected commissioners was John Pate. McKinney testified that he had difficulties with Pate on several occasions. Pate was appointed the liaison for the Board of Commissioners with plaintiff's department.

Following plaintiff's employment several problems arose concerning his department, i.e., relations with members of the public, relations with building applicants, delay in answering the telephone, and complaints about his code enforcement with contractors. Plaintiff testified that he corrected the problems which were the subjects of these complaints. However, he eventually alienated first his immediate superior, the county administrator, and then the board of county commissioners.

As a result, a list of grievances was filed, a copy of which plaintiff received, and an extended hearing was held by the board of commissioners. At said hearing, both plaintiff and the board of commissioners was represented by attorneys. The prosecutor was a labor attorney for the county.

Plaintiff asserts that Pate was not an impartial judge, but stated he thought he would receive the votes of at least three of the five commissioners. He found no fault with three commissioners, but, aside from Pate, he as-

serted that Chairman Owens was serving as a commissioner when he in fact had contracts with the county.

The parties agreed that the plaintiff had a "property interest" in his employment and the action of firing him was a state action "under color of state law."

Plaintiff claims that the charges against him were pretextual and that he was fired because of politics. The charges were:

> 1. The first and major reason for termination is on the basis that the condition of the front counter of the Building Division has not improved since a public hearing held by the Board of County Commissioners on March 14, 1988, and April 25, 1988.
>
> 2. Little or no information passed to the technicians about job changes and job responsibilities.
>
> 3. Permits are being issued to property located within the city limits, thus creating misinformation to the public.
>
> 4. Front office staff needs to consistently access legal description from computers.
>
> 5. Front office staff is still negligent in answering telephones.
>
> 6. Even though the front counter personnel received pay increases, the productivity has not increased, enthusiasm has not increased, and public relations has not increased.
>
> 7. Permits should not be issued to unlicensed contractors. There is no evidence of any procedures set up to stop issuance of these permits.
>
> 8. Division head fails to follow through with suggestions and procedures to improve the front counter.
>
> 9. Inspectors are not coordinating with each other in the field.

10. The general attitude of the inspectors has not improved in the field, where they need to represent the County.

11. In addition, in terms of office procedures, the Building Official has encumbered costs and charged such costs to accounts never approved under the budget, without permission from me (Jack Shannin) to do so.

12. Also, the Building Official continually oversteps his authority and takes items to either the County Administrator for Commission members directly without my permission or knowledge.

13. The Building Official has consistently failed to follow through in informing the building inspectors to ascertain that zoning setbacks are being met when inspecting a building.

14. Construction of McKinney home.

We must keep in mind that the sole issue in this case is whether plaintiff received "substantive due process," not procedural due process, at his hearing. Plaintiff admits that conflicting evidence was heard on every ground asserted for his termination. The public, building permit applicants, contractors and county employees testified. The plaintiff also testified. One of the principal matters concerned the conflict of interest issue that arose out of the plaintiff's construction of his home.

Plaintiff entered into a contract with a contractor to construct a personal residence for his wife and himself. He requested the county employees whom he supervised to inspect the construction for code compliance. Difficulties arose. The contractor testified relative to pressure to evade code compliance. He also testified as to nonpayment of a portion of the contract price. Thus, inspection problems were definitely a conflict of interest.

After hearing all the evidence, all five commissioners voted to terminate his employment and adopted findings of fact embracing all the charges. However, the one item that was the "straw that broke the camel's back" was the conflict of interest arising out of the plaintiff's home construction.

Plaintiff did not attack the impartiality of three of the five commissioners. He did not deny that the employees he supervised inspected his home. He did assert that he had a reasonable explanation for all the remaining charges.

In view of the conflicting evidence and the lack of proof of impartiality of the judges/commissioners, the jury was compelled to find that the action taken by the Board of Commissioners was not arbitrary, capricious and pretextual. It was compelled to find that the plaintiff received substantive due process.

The jury verdict is set aside and a judgment will be entered for defendant. An appropriate order will be entered.

/s/ L. Clure Morton
L. CLURE MORTON
Senior U.S. District Judge
for the Middle District of
Tennessee, Sitting by
Assignment in the Middle
District of Florida

APPENDIX E

[Filed Feb. 4, 1991]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 89-836-CIV-ORL-19

MILLARD MCKINNEY,
Plaintiff,

v.

JOHN PATE, ETC., *et al.*,
Defendants.

ORDER

This cause was considered upon Defendants' Motion for Summary Judgment and Memorandum in Support thereof (Doc. No. 16, filed November 15, 1990) and the documents filed in support of the Motion for Summary Judgment; and Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment (Doc. No. 22, filed January 3, 1991) and the documents filed in opposition to the Motion for Summary Judgment.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a summary judgment motion, the Court must view all reasonable inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and must resolve any reasonable doubts against the moving

party. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If, however, the party opposing the motion fails to make a showing sufficient to establish the existence of an element essential to that party's case, there can be no genuine issue as to any material fact. In such a situation, the complete failure of proof concerning an essential element on which the nonmoving party has the burden of proof renders all other facts immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Count I of the Complaint asserts a claim under 42 U.S.C. § 1983 for violation of Plaintiff's substantive due process rights. Plaintiff claims that the Defendants deprived him of his property rights in his employment as Building Official with the Osceola County Development Department. He maintains that the Defendants effectuated his termination from this position for an improper motive and by means that were pretextual, arbitrary and capricious.

Defendants move for summary judgment on Count I, contending that the undisputed facts of the case demonstrate that Plaintiff cannot prove a violation of his substantive due process rights. Defendants argue that they did not act in such a manner as to deliberately circumvent or deny Plaintiff procedural protections to which he was entitled. In addition, Defendants assert that the alleged actions of the Defendants were not so egregious as to support a substantive due process claim. Finally, Defendants state in conclusory fashion that Plaintiff had an adequate remedy in state court.

This Circuit has repeatedly recognized that a person has a constitutionally protected property interest in employment where there are "rules or mutually explicit understandings that support his claim of entitlement." *Blanton v. Griel Memorial Psychiatric Hospital*, 758 F.2d 1540, 1542 (11th Cir. 1985); *Barnett v. Housing Authority of City of Atlanta*, 707 F.2d 1571, 1576 (11th

Cir. 1983); *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982). The deprivation of such a property interest for an improper motive or by means that are pretextual, arbitrary and capricious constitutes a substantive due process violation. *Barnett*, 707 F.2d at 1577; *Hearn*, 688 F.2d at 1332. Where government employment is terminable only "for cause" or other specified reasons, the employee has a property interest in continued employment and the strictures of substantive due process are implicated. *Blanton*, 758 F.2d at 1542.

It is undisputed that Plaintiff could be terminated from his position as Building Official only for proper cause. Consequently, he enjoys a constitutionally protected property interest in his continued employment with Osceola County. Defendants have failed adequately to rebut Plaintiff's allegations that they caused Plaintiff's termination as Building Official for an improper motive and by pretextual, arbitrary and capricious means. There remain genuine issues as to whether the Defendants acted for an improper purpose and whether the means by which they effected his termination were pretextual, arbitrary and capricious. Consequently, Defendants are not entitled to summary judgment on Count I.

Count II asserts a claim described as "wrongful injury to employment." Plaintiff contends that Defendants Pate and Shannin conspired and combined, and acted individually, to wrongfully procure Plaintiff's discharge from his employment with Osceola County. In addition to this loss of employment, Plaintiff alleges that Defendants' conduct deprived him of other potential employment opportunities. Plaintiff, however, does not allege the existence of any employment relationship other than his position as Building Official for Osceola County.

Defendants contend that Plaintiff attempts to assert a claim for tortious interference with a business relationship, in this case, an employment relationship. They argue that Plaintiff has failed to state a claim because such

a claim can be maintained only against one who is not a party to the employment relationship. They point out that both Shannin and Pate were parties to the employment relationship between Plaintiff and Osceola County.

Plaintiff insists that Count II is not a claim for tortious interference with an employment relationship but rather a separate cause of action for wrongfully conspiring and acting to cause Plaintiff's dismissal. Plaintiff relies on *Faulk v. Allen*, 12 So.2d 109 (Fla. 1943) as authority for the viability of this claim. In addition, Plaintiff refers to a passage from a legal treatise quoted in *Regan v. Davis*, 97 So.2d 324 (Fla.2nd D.C.A. 1957) which states that "an action lies for every injury suffered by reason of a violent or malicious act done to a man's occupation, profession, or way of getting a livelihood." *Id.* at 327.

Plaintiff has failed to identify a claim for wrongful injury to employment other than tortious interference with an employment relationship. In *Faulk*, the plaintiff's claim was based on false and malicious information reported to government officials by individuals with no apparent connection to the plaintiff's employment relationship with the state. *Faulk*, 12 So.2d at 109-10. This information allegedly caused the dismissal of the plaintiff, and the court determined that plaintiff had a cause of action against the individuals who provided the false information. *Id.* The *Regan* case involved a similar situation. In *Regan*, the court held that the plaintiff stated a cause of action for interference with her right to practice her profession where she alleged that she was dismissed because of a malicious and defamatory letter sent to her supervisor by defendants. *Regan*, 97 So.2d at 326-28.

In both *Faulk* and *Regan* the courts specifically considered whether an employment contract existed between the plaintiff and the recipient of the defamatory statements and whether the actions of the third parties interfered with that relationship. Neither of the courts drew

a distinction between the claim it recognized and a claim for tortious interference with a business relationship. In fact, the *Regan* court explicitly analyzed the claim as one for tortious interference with a business relationship. *Id.* at 327-28. Furthermore, the treatise passage to which the *Regan* court refers and upon which Plaintiff relies is entitled "Interference." *Id.* at 327. Neither of these cases provide authority for the existence of a claim other than one based on interference with an employment relationship.

Having determined that Plaintiff has not asserted any claim other than one for tortious interference with his employment relationship with Osceola County, the Court next considers the contention that no such claim may lie against Defendants Pate and Shannin. It is well-settled under Florida law that there is no cause of action for interference with an employment relationship by parties to that relationship.[1] *Albritton v. Gandy*, 531 So.2d 381, 387 (Fla.1st D.C.A. 1988); *Buckner v. Lower Florida Keys Hospital District*, 403 So.2d 1025, 1028 (Fla.3rd D.C.A. 1981); *West v. Troelstrup*, 367 So.2d 253, 255 (Fla.1st D.C.A. 1979). It is undisputed that Defendant Shannin, as Director of the Development Department,

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[1] Plaintiff's reliance on *Churruca v. Miami Jai-alai, Inc.*, 353 F.2d 547 (Fla. 1978) is misplaced. In *Churruca*, the Court identified a narrow situation in which a conspiracy by itself may become an independent tort. *Id.* at 550. The Court stated that the conspiracy claim need not have an underlying tort where the combination possesses some "peculiar power of coercion." *Id.* In addition, despite Plaintiff's contention to the contrary, the defendants in *Churucca* were not parties to an employment relationship with the plaintiffs. Rather, the defendant jai-alai frontons were the former employers of jai-alai players who went on strike and refused to honor their 1968-1969 player contracts. *Id.* at 548-49. The players sued the frontons when they refused to reemploy the players the following season. *Id.* Consequently, *Churruca* does not support the existence of an independent tort for "wrongful injury to employment" or the proposition that a claim for interference with an employment relationship may lie against a party to that relationship.

hired Plaintiff and proposed his discharge and that Defendant Pate, as a member of the Osceola County Commission, shared in the final determination as to whether Plaintiff's employment should be terminated. Therefore, both Pate and Shannin were parties to the employment relationship between Plaintiff and Osceola County. *See Buckner*, 403 So.2d at 1028; *West*, 367 So.2d at 255. Consequently, a claim for interference with this employment relationship may not lie against Defendants Shannin and Pate, and they are entitled to relief as a matter of law.

For the foregoing reasons, Plaintiff's Motion for Summary Judgment (Doc. No. 16) is GRANTED in part and DENIED in part. The Court DENIES Summary Judgment on Count I and GRANTS Summary Judgment on Count II.

DONE AND ORDERED at Orlando, Florida, this 4th day of February, 1991.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
United States District Judge

Supreme Court, U.S.
FILED
DEC 14 1994
OFFICE OF THE CLERK

No. 94-568

In The

Supreme Court of the United States

October Term, 1994

MILLARD McKINNEY,

Petitioner,

vs.

OSCEOLA COUNTY BOARD OF COUNTY COMMISSIONERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

The Petition for Writ of Certiorari does not raise a novel issue, and the decision of the United States Court of Appeals for the Eleventh Circuit does not conflict with any decision of the Supreme Court.

The statement of case, including all necessary material facts, is succinctly set forth in the *en banc* decision of the United States Court of Appeals for the Eleventh Circuit.

Although this Court has not specifically addressed substantive due process in the state employment context, it has offered several guideposts. The substantive component of the Due Process Clause of the Fourteenth Amendment is designed to prevent the government from using its vast powers for the purpose of oppression. *Collins v. City of Harker Heights*, __ U.S. __, 112 S. Ct. 1061 (1992); *Daniels v. Williams*, 474 U.S. 327 (1986). Substantive due process protects those rights that are "fundamental," that is, rights that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Rights enumerated in the Bill of Rights are fundamental and also certain other unenumerated rights such as the right of privacy. *Planned Parenthood v. Casey*, __ U.S. __, 112 S. Ct. 2791 (1992).

This Court has repeatedly stressed the narrow scope of the substantive due process. In *Moore v. City of East Cleveland*, 431 U.S. 492, 502 (1977), this Court cautioned against extending this protection beyond the Bill of Rights. More recently, this Court rejected the argument that substantive due process protects a governmental employee's right to a safe work environment based on the reluctance to broadly extend the protection. *Collins v. City of Harker Heights*, __ U.S. __, 112 S. Ct. 1061, 1068 (1992). ("The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.")

Coupled with this explicit reluctance to extend the

substantive due process protection to any rights other than those constitutionally created fundamental rights is this Court's disinclination to involve the federal courts in reviewing routine state employment decisions. In *Bishop v. Wood,* 426 U.S. 341 (1976), a police officer claimed his termination deprived him of both a property interest and a liberty interest. The Court determined that neither interest had been raised and concluded with a strong statement that state employment decisions are not subject to substantive due process analysis:

> The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Id. at 350.

Since this Court has not squarely dealt with the issue of substantive due process for state created employment rights, it is not surprising that the federal circuits have not uniformly treated this issue. However, this has not led to any clear dichotomy among the federal circuits. Decisions from the Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have indicated that state created property interests in employment have no substantive due process protection. *See, e.g., Huang v. Board of Governors of University of North Carolina,* 902 F.2d 1134 (4th Cir. 1990), *Sutton v. Cleveland Board of Education,* 958 F.2d 1339 (6th Cir. 1992); *Kauth v. Hartford Insurance Co. of Illinois,*

852 F.2d 951 (7th Cir. 1988); *Lum v. Jensen,* 876 F.2d 1385 (9th Cir. 1989); *Mangels v. Pena,* 789 F.2d 836 (10th Cir. 1986). While the Fifth and Eighth Circuits acknowledge a "substantive due process" right in continued employment, the availability of a prompt post-termination hearing forecloses a substantive due process cause of action. *Schaper v. City of Huntsville,* 813 F.2d 709 (5th Cir. 1987); *Weimer v. Amen,* 870 F.2d 1400 (8th Cir. 1989).

Although the First, Second, and Third Circuits have recognized the possibility of a substantive due process right, no substantive due process claim is usually found. *See, e.g., Coyne v. City of Somerville,* 972 F.2d 440 (1st Cir. 1992); *Copeland v. Philadelphia Police Dept.,* 840 F.2d 1139 (3rd Cir. 1988); *but see, Gargiul v. Tompkins,* 790 F.2d 265, 273 (2nd Cir. 1986). ("Considerations of privacy clearly influenced the ... determination of arbitrariness.")

In addition, the relative infrequency that the issue has been raised in the various circuits over the past ten years justifies denying the Petition for Writ of Certiorari. Except for the now over-ruled decisions from the Eleventh Circuit, circuit court decisions upholding a substantive due process claim in the state employment context are rare.

Although the Petitioner raised only a substantive due process claim at trial, the Eleventh Circuit treated his complaint as a procedural due process concern and found no claim was stated. The Petition for Writ of Certiorari should be denied because *Parratt v. Taylor,* 451 U.S. 527 (1981) and its progeny *Hudson v. Palmer,* 468 U.S. 517 (1984), was properly applied to the circumstances presented in this case. The Petitioner's alleged procedural deprivation is action taken by an alleged "biased" board. Any bias conduct was clearly not sanctioned by the state. More importantly because acts of bias by their very nature are intentional and unpredictable, the state cannot in any relevant sense anticipate and meaningfully guard against them. Therefore, unauthorized and intentional acts of bias resulting in an alleged

procedural due process violation are controlled by the *Parratt* doctrine. Only by failing to provide a means to correct the alleged bias would the state violate procedural due process. *Parratt,* 451 U.S. at 544.

Petitioner urges that the Petition for Writ of Certiorari be granted because of confusion created by this Court's opinion in *Zinermon v. Burch,* 494 U.S. 113 (1990). Moreover, Petitioner argues that *Zinermon* applies broadly to prevent the application of the *Parratt* rule to these facts: (1) because the Board itself had the authority to effect the deprivation and also had the power to provide a pre-deprivation hearing; and (2) because a pre-deprivation hearing was in fact held, the Petitioner argues it was obviously "feasible."

Petitioner's argument, however, is incorrect because it attempts to impermissibly broaden the application of *Zinermon.* First, unlike *Parratt,* the specific conduct causing the deprivation in *Zinermon* was not "random and unauthorized." *Id.* at 138. In this case the alleged deprivation was based on a state actor's intentional act of bias. As in *Hudson* where the state could not anticipate when a guard would intentionally and maliciously destroy a prisoner's property, the state in this case cannot anticipate and control unauthorized and intentional acts of bias. Therefore, since bias conduct is neither foreseeable nor predictable, the doctrine of *Parratt* is applicable to this case.

The Petitioner's argument that since a pre-termination hearing was provided, "feasibility" is presumed and thus dispositive on the *Parratt* issue, misinterprets the significance of the "impossibility" language found in *Zinermon.* It was clearly recognized in *Zinermon* that any pre-deprivation process is not effective when a state actor is "bent upon effecting the substantive deprivation and would have done so despite any and all pre-deprivation safeguards." *Id.* at 137. As in *Hudson,* where it would have been absurd to suggest that the state hold a hearing to determine whether a prison guard should maliciously destroy a prisoner's property, it would be both absurd and ineffective to

establish a procedural requirement that attempts to prevent a biased board member, indifferent to guaranteed protections, from effecting the alleged deprivation. Because a pre-deprivation hearing needed to address the risk of this kind of alleged deprivation is "impracticable," the *Parratt* doctrine clearly applies.

The "adequacy" of McKinney's state court remedy is relevant if this Court concludes that the case raises only procedural due process issues and the doctrine of *Parratt* applies. The Petitioner argues that merely because the state court's review of the administrative proceeding is limited to the record the Florida process is inadequate. However, as recognized by the Eleventh Circuit, when reviewing the administrative record, the Florida courts have both the authority to order the relief requested, *i.e.*, a new hearing conducted by a fair tribunal, and the duty to determine whether procedural due process is properly accorded.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

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